IN THE

Supreme Court of the United States

October Term 1947

LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, *et al.*,
Appellants,
against
UNITED STATES OF AMERICA,
Appellee.
No. 80

UNITED STATES OF AMERICA,
Appellant,
against
PARAMOUNT PICTURES, INC., *et al.*,
Appellees.
No. 79

ON APPEAL FROM JUDGMENT, DECREE AND FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RKO DEFENDANTS AS APPELLANTS IN NO. 80 AND AS APPELLEES IN NO. 79

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INDEX

ARGUMENT FOR RKO APPELLEES IN No. 79

List of Authorities Cited

Table of Statutes

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Opinion and Judgment Below

The Opinion of the District Court (R. 3504)[1] is reported at 66 F. Supp. 323; the Decree (R. 3694) is reported at 70 F. Supp. 53.

[1] In this Brief, the abbreviation "R" refers to the printed Record.

Jurisdiction

Jurisdiction of this Court is invoked under Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 15 U. S. C. §29), and Section 238 of the Judicial Code, as amended (43 Stat. 938; 28 U. S. C. §345).

Statutes Involved

Sherman Act (26 Stat. 209, 15 U. S. C.):

> Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *
>
> * * * * * *
>
> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The Copyright Act (35 Stat. 1075, 17 U. S. C.):

> Section 1. Any person entitled thereto upon complying with the provisions of this title, shall have the exclusive right:
>
> (a) To print, reprint, publish, copy, and vend the copyrighted work;
>
> (b) To translate the copyrighted work into other languages or dialects, make any other version thereof, if it be a literary work; to dramatize it

if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

* * * * *

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever. * * *

Statement of the Case

This is a suit in equity[2] under Section 4 of the Sherman Anti-trust Act to enjoin an alleged combination to restrain and monopolize the production, distribution and exhibition of motion pictures in violation of Sections 1 and 2 of the Sherman Act (R. 3137). The defendants are eight motion picture organizations:[3] RKO, Fox, Loew's, Para-

[2] The original complaint filed on July 20, 1938, was superseded by an amended and supplemental complaint filed November 14, 1940 (R. 3137).

On November 20, 1940, a consent decree was entered as to the five theatre owning defendants. The case at bar arises upon motion by the plaintiff to modify the consent decree (R. 3373).

[3] In this brief the United States will be referred to as "the plaintiff." The defendants, unless otherwise indicated will be referred to by abbreviated titles as follows:

"RKO"—Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., Keith-Albee-Orpheum Corporation, RKO Proctor Corporation and RKO Midwest Corporation;

mount and Warner, each of which produces, distributes and exhibits; Columbia and Universal, each of which produces and distributes; and United Artists, which distributes feature motion pictures. "As between the eight defendants • • • there are no officers or directors in common, and none of said defendants owns any controlling stock or other securities in any other of said defendants" (Finding of Fact No. 57, R. 3670).

After the filing of an Expediting Certificate (R. 3502) under the Act of February 11, 1903 (32 Stat. 823, 15 U. S. C. §28), the case was tried before a Court composed of Circuit Judge Augustus N. Hand and District Judges John Bright and Henry W. Goddard (R. 3504).

The Court filed Findings of Fact and Conclusions of Law (R. 3659) and entered a Decree (R. 3694) which enjoined certain trade practices and required the termination of certain local agreements and the dissolution of certain joint interests. The Court refused the plaintiff's request that each theatre owning defendant be compelled to divest itself of all interests in theatres or in the alternative

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"Paramount"—Paramount Pictures, Inc. and Paramount Film Distributing Corporation;

"Loew's"—Loew's Incorporated;

"Warner"—Warner Bros. Pictures Inc., Vitagraph, Inc. and Warner Bros. Circuit Management Corporation;

"Fox"—Twentieth Century-Fox Film Corporation and National Theatres Corporation;

"Columbia"—Columbia Pictures Corporation, Columbia Pictures of Louisiana, Inc. and Screen Gems, Inc.;

"Universal"—Universal Corporation, Universal Film Exchanges, Inc. and Big U Film Exchanges, Inc.;

"United Artists"—United Artists Corporation.

Paramount, Loew's, Warner, Fox and RKO are at times referred to as the "theatre-owning defendants" or as "distributor-exhibitor defendants."

be enjoined from exhibiting in its theatres any feature distributed by another theatre-owning defendant.

RKO joined with certain of the other defendants in a motion to amend the Findings and Conclusions and the Decree (R. 3703). This motion was overruled February 11, 1947 (R. 3719).

All parties appealed, and six docket numbers have been assigned. The plaintiff's appeal was assigned No. 79; the respective defendants' appeals, Nos. 80 (Loew's, RKO, Fox, Warner); 81 (Paramount); 82 (Columbia); 83 (United Artists); 84 (Universal).

Questions Presented

This Brief combines RKO's Brief as Appellant in cause No. 80 and its Brief as Appellee in cause No. 79.

The questions presented by RKO as Appellant in No. 80 are:

I. Whether the provision of the Decree, Part III, Paragraph 6, which absolutely prohibits this defendant from expanding its theatre holdings, is necessary or appropriate to prevent or restrain the violations of the Sherman Act found to have existed.

II. Whether the provision of the Decree, Part III, Paragraph 5, which requires RKO to terminate its investments amounting to over 5% and less than 95% in certain local theatre holding and operating companies either by selling its interest or by acquiring (with court approval) the interest of others, is a necessary and appropriate exercise of the court's discretion to prevent or restrain the violations of the Sherman Act found to have existed.

III. Whether the provision of the Decree, Part II, Paragraph 1, which prohibits RKO from setting the minimum admission price to be charged during the exhibition of the feature licensed, deprives it of a legitimate right to contract for the exhibition of the ordinary copyrighted feature motion pictures distributed by it in its routine operations.

IV. Whether the provision of the Decree, Part II, Paragraph 1, which prohibits RKO from setting the minimum admission price to be charged during the exhibition of the feature licensed, deprives it of a legitimate right to contract for the exhibition of the unusual copyrighted feature motion pictures distributed by it for special pre-release road show engagements.[4]

V. Whether the District Court erred in failing to Decree that disputes between one or more of the defendants and exhibitors arising under the decree should be determined by arbitration under the Rules of Arbitration provided in the Consent Decree (R. 3373) pursuant to the prayer of the Plaintiff's Amended and Supplemental Complaint (R. 3137).

The other questions raised by RKO's assignments of error have been thoroughly briefed by other appellants, and will not be discussed herein. They are not, however, waived by RKO.

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[4] A road show is defined by the Court as:

> "A public exhibition of a feature in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in the areas where they are located" (Finding of Fact No. 1, R. 3660).

The questions discussed by RKO as Appellee in No. 79, which fully cover all propositions advanced by the United States as Appellant therein, are:

VI. Whether the District Court was correct in its refusal to find that RKO through the use of its theatres was engaged with the other theatre operating defendants in a nationwide conspiracy to monopolize the distribution and exhibition of motion pictures, and hence was correct in its refusal to treat the theatre operations of the five defendants as an aggregate in considering the plaintiff's general charge of monopoly in exhibition.

VII. Whether the District Court was correct in refusing to hold that RKO, when considered alone as an integrated company producing, distributing, and exhibiting motion pictures, is in itself an unlawful combination.

VIII. Whether, in view of the adequate relief granted by the Decree of the District Court, that Court was correct in its refusal to order RKO to divest itself of its theatres or its production and distribution facilities, and was correct in its refusal to enjoin RKO from licensing its features to theatres affiliated with other defendants and to enjoin other producer-exhibitor defendants from licensing features for exhibition in RKO theatres.

The Facts

A. The industry prior to the organization of RKO.

By 1927 seven of the eight defendants were active. Five were engaged in production and exhibition: Paramount (R. 606, 894, 964), Fox (R. 1247), Loew's (R. 906, 1839), Warner (R. 1556), and Universal (R. 1969-70, 2078). A sixth, United Artists, organized in 1919 (R. 1407), was distributing features, and certain of its controlling stockholders were interested in United Artists Theatre Circuit, Inc., which had a relatively small circuit of theatres (R. 1233). Columbia was producing features (R. 906), and would shortly, in 1929, organize its national distribution system (R. 1256).

B. Organization of RKO, 1928-1932.

The organization of RKO stemmed directly from the introduction of sound pictures between 1925 and 1927. In 1925 Warner, under license from Electrical Research Products, Inc. (ERPI), a subsidiary of Western Electric Co., had undertaken the development of sound pictures (R. 1554). Fox also interested itself in sound recording and reproduction. By 1927 both companies, using ERPI equipment, were able to produce and exhibit pictures which indicated that this was to be the next major development in the industry (R. 1597). ERPI thereupon proceeded rapidly to place its equipment in most studios and in many of the leading theatres (R. 1597).

In 1928 Radio Corporation of America (RCA) perfected sound recording and reproduction equipment for motion pictures. It thus became the only company in a position to challenge the dominance of ERPI, but it was faced by the fact that ERPI's equipment was already established, installed, and in successful use. Against this handicap, RCA

determined to form a new company capable of entering the market and demonstrating by actual performance the competitive merits of its own product (R. 1597).

Radio-Keith-Orpheum Corporation, organized October 25, 1928, was the outgrowth of this decision (Gov. Ex. 87). The Court found:

> *"The organization of RKO did increase competition in each of the three branches of the industry"* (Finding of Fact No. 23, R. 3664).

Production and distribution facilities were acquired by RKO through FBO Productions, Inc., which was a small, inconspicuous, and relatively weak producing company with a national distributing organization. Seven million dollars were invested in modernizing, enlarging and equipping its properties for sound (R. 1599). The Court found:

> *"The formation of RKO introduced a new and substantial competitive factor in the production and distribution of motion pictures"* (Finding of Fact No. 20, R. 3664).

Between 1928 and 1932 RKO acquired, by purchase or lease, and operated approximately 200 theatres. These theatres were located in 48 cities of over 100,000 population and 14 smaller cities (Gov. Exs. 89, 91, 97-101, 105-107, 158, 159).[6] The locations of the cities are shown on Figure 1, page 11.

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[6] The evidence does not reflect all of RKO's interests during the organization period, but it furnishes sufficient data to indicate their general scope. In 1928 and 1929 RKO acquired a number of vaudeville theatres, which had been owned or operated by Keith-Albee-Orpheum, the Orpheum Circuit, and F. F. Proctor Holding Corp. These theatres were located in the East and the Mid-West. In 1929 through 1931 theatres were added in new areas as widely separated as Georgia and Washington, Texas and Wisconsin, Utah and Rhode Island.

Most of these theatres were large houses suitable for first-run operation. Many of them were vaudeville theatres which were rapidly being outstripped by newer and finer theatres constructed primarily for the exhibition of motion pictures. RKO met the competitive challenge by investing some $8,000,000 in rehabilitating and modernizing its theatres and equipping them for sound (R. 1599).

There is no contention that RKO in acquiring these theatres was guilty of any predatory or improper practices. As to the effect of the acquisitions, the Court found:

> *"The formation of RKO * * * introduced new and substantial competition into the exhibition field in the cities in which each of these theatres was located"* (Finding of Fact No. 121, R. 3684).

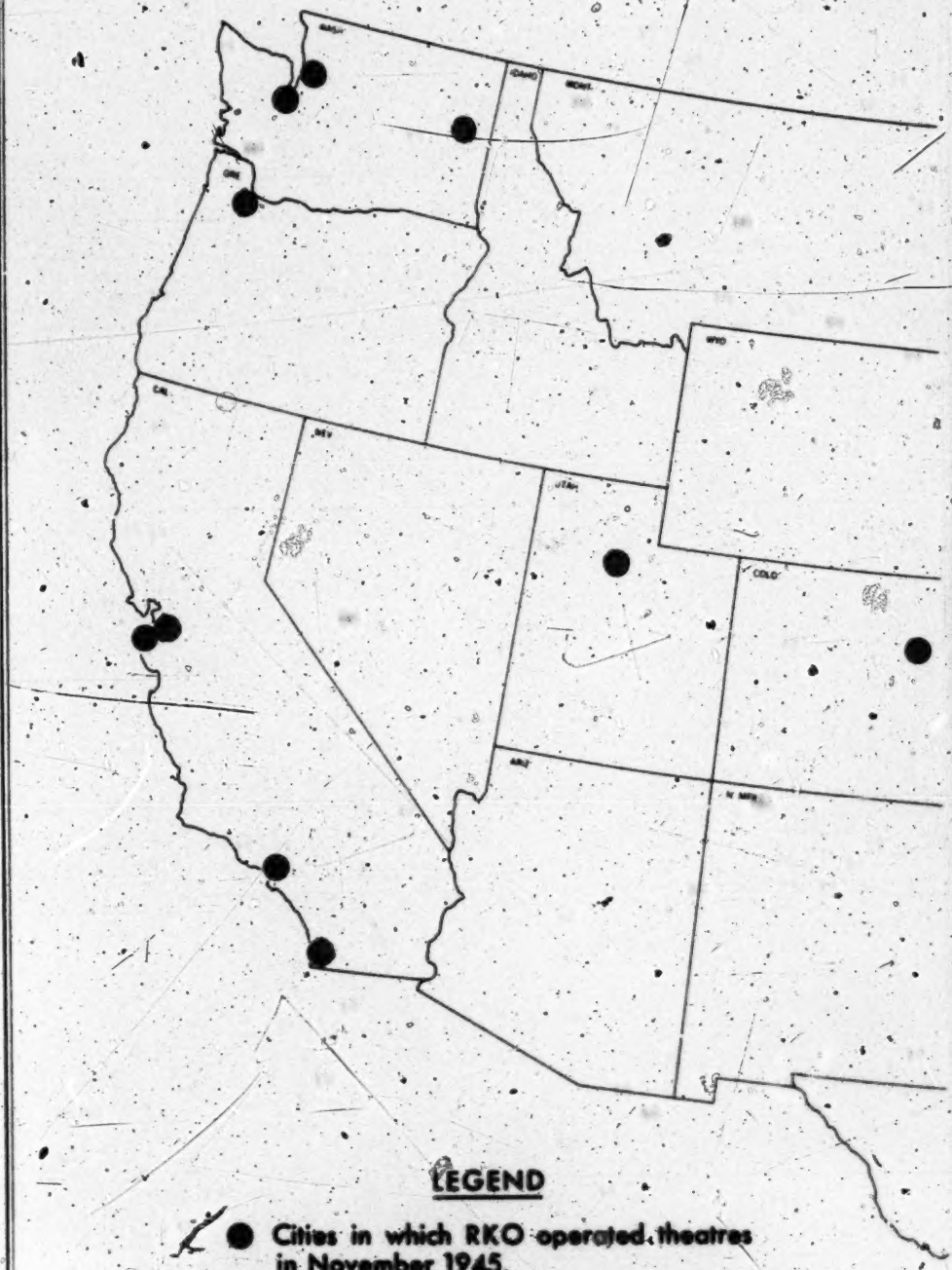
C. RKO's financial difficulties.

In 1933 RKO went into receivership. This was followed by reorganization proceedings under Section 77B of the Bankruptcy Act. The company was not freed of these proceedings until 1940 (Gov. Ex. 91). Some 57 of its theatres were lost during the receivership and reorganization (Gov. Exs. 158, 159, R. 1600). Another 60 theaters had been eliminated from its operations before the trial, most of these before 1933. Plaintiff concedes that there has been virtually no expansion of RKO's theatre holdings since 1935 (R. 1600). In the same period, however, the total number of theatres in the United States increased from 13,386 to 18,076 (Finding of Fact No. 145, R. 3688).

D. RKO's theatre holdings at the date of trial.

RKO's theatre holdings at the date of the trial were of three types:

LOCAT



LEGEND

- Cities in which RKO operated theatres in November 1945.
- Cities in which RKO formerly operated theatres, operation lost prior to November 1945.

1. Theatres operated by RKO.

At the date of the trial RKO was operating 106 theatres located in 38 cities (RKO Ex. 1). Of these, RKO owned in fee only 32. Of the remainder, 51 were leased; 3 were held in part in fee and in part under lease; and 20 were joint interests of the type condemned by the Decree (RKO Exs. 1, 11; Gov. Ex. 158). RKO owned, but did not operate eight additional theatres located in seven cities (Gov. Ex. 158). The locations of the cities wherein RKO operated theatres at the time of the trial are shown on Figure 1.

2. Beneficial interests with defendants and independents.

At the time of the trial, RKO held beneficial interests in a number of local theatre operating or holding companies, most of these being minority interests. Specifically, RKO held the following interests:[7]

10% interest in 2 companies having 96 theatres
15% interest in 1 company having 1 theatre
20% interest in 1 company having 136 theatres
25% interest in 2 companies having 8 theatres
30% interest in 1 company having 1 theatre
33-1/3% interest in 3 companies having 24 theatres
35% interest in 1 company having 3 theatres
49% interest in 1 company having 1 theatre
50% interest in 5 companies having 16 theatres
65% interest in 1 company having 3 theatres

[7] Finding of Fact No. 117 (R. 3683) shows RKO as having joint interests with other exhibitors in 318 theatres. This Finding, however, is predicated on RKO Exhibit 11 which made no distinction between beneficial interests falling within Paragraph (5) and "pooling situations" coming within Paragraph (2) of Part III of the decree. See Government Exhibits 87, 96, 99, 105.

The majority of such interests were owned by predecessor companies or were acquired shortly after RKO was organized. The record shows the lawful purpose for which RKO was formed. The plaintiff introduced no evidence to show either the purpose or the effect of RKO's ownership of such interests. Under the Decree, if it remain in its present form, RKO will be compelled to terminate these joint interests by December 31, 1948. It may do so by disposing of its interest or by acquiring (with court approval) the interest of its co-owner.[8]

No evidence was offered by the plaintiff to support any finding that such interests were improperly acquired or had in any locality any adverse effect upon competition.

3. Pools and leases.

At the time of the trial RKO had 14 theatres, located in 9 cities, which were parties to "pools."[9] All such operating agreements have been terminated.

At the date of the trial RKO owned the fee of three theatres and a leasehold on two theatres which had been leased and subleased, respectively, to Fast Theatres, Inc. in January, 1935 for a flat rental, plus a percentage of profits (Gov. Ex. 204). These theatres were located in Albany, Troy, and Schenectady, N. Y. RKO has never licensed features for them (R. 588). To comply with the

[8] RKO has already sold its interest in Affiliated Theatres and in The United Theatres Company (Report of Compliance, July 1, 1947).

[9] The court refers to "pooling agreements" as "agreements whereby given theatres of two or more exhibitors normally in competition are operated as a unit or whereby the business policies of such exhibitors are collectively determined by a joint committee or by one of the exhibitors or whereby profits of the 'pooled' theatres are divided among the owners according to prearranged percentages" (Decree, Part III, paragraph 2; R. 3600).

Decree, RKO has sold these owned and leased theatres (Report of Compliance, dated July 1, 1947).

E. RKO as producer, distributor and exhibitor.

The plaintiff in its appeal demands that RKO be compelled to divest itself of all its theatres. RKO in its appeal asks that it be allowed to expand its theatre holdings where justified by an affirmative showing that such expansion will not unlawfully restrain or monopolize trade.

Pertinent to the issues presented on both appeals, therefore, are the facts as to: 1. The increased efficiency and economy resulting from the operation by RKO as an integrated unit; and, 2, the evidence as to the ability of others to compete with RKO at each level.

1. RKO's operation as an integrated unit results in increased efficiencies and economies.

a. *Show-case theatres.*

The theatres operated by RKO serve an unique and useful function in the advertising of features distributed by RKO. It is significant that this advertising function redounds not only to the advantage of RKO but also of subsequent run exhibitors in areas in which such RKO theatres are located. As found by the Court,

> "The ownership and operation by RKO of theatres in certain principal cities of the United States enables RKO through the utilization of the facilities of such theatres to plan and direct the first exploitation of the features which it distributes in such areas in a more effective manner than is possible in areas where RKO does not operate theatres" (Finding of Fact No. 122, R. 3685).
>
> "The successful exhibition of a feature in its initial runs in any area is widely publicized and

closely observed by subsequent run exhibitors in that area and success in exploiting a picture in such exhibitions produces increased revenue both for the distributor and for subsequent run exhibitors" (Finding of Fact No. 123, R. 3685).

The significance of these Findings will appear from a brief description of the mechanics of motion picture distribution.

The fundamental fact is that it is not feasible to exhibit the feature in all theatres simultaneously.[10] Hence the

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[10] An outstanding feature will be exhibited in from 8,000 to 14,000 theatres (R. 668, 1696-97). At the date of trial each black and white print cost $150 to $300, each color print $600-$800 (Finding of Fact No. 74, R. 3673).

Few theatres could afford to pay a license fee of $500, which would be the minimum amount necessary to recover the cost of production and distribution on an average feature if 10,000 prints were made. This is shown by the record on RKO's most widely exhibited feature in 1943-44, LADY TAKES A CHANCE. The following table shows the number of exhibitions at stated license fees in the larger cities.

	First Run, Cities of 25,000 and over	Second Run, Cities of 50,000 and over	Third Run, Cities of 200,000 and over	Fourth Run, Cities of 1,000,000 and over
Over $10,000	7	0	0	0
$5,000-10,000	22	1	0	0
2,500-4,999	58	6	1	0
1,000-2,499	160	21	2	8*
500- 999	113	31	9	2
250- 499	53	60	36	8
100- 249	42	153	66	50
50- 100		78	88	64
Less than 50		31	39	28
Total	455	381	241	160

* Seven of the eight fourth run situations paying in excess of $1000 were in Philadelphia, Pa.

Source: Gov. Ex. 94

distributor must determine the number of prints which, by rapid shuttling between theatres, can most efficiently service the exhibitors without unduly magnifying the expense to be paid, ultimately, by the theatre patron. Each additional print, on the one hand, will permit more rapid circulation, and, on the other, will increase the investment to be recovered. The number of prints depends on the anticipated demand (R. 668, 670). The present practice is to make 200 to 350 prints (R. 415, 670),[11] each of which is circulated as rapidly as possible to some 30 to 40 theatres (R. 417).

Because of this limited number of prints, a feature cannot possibly show on the same day in more than 300 to 350 theatres. "[L]icensing features for exhibition on different successive dates is essential in the distribution of feature motion pictures" (Finding of Fact No. 75, R. 3673). In accord with logical business judgment, the distributor licenses runs in the order of importance (R. 415). Initial showings should be, and where possible are, in the largest theatres in the largest cities. These theatres have greater capacity and can accommodate more patrons than first-run theatres in smaller towns, or neighborhood theatres in the same city. Out of their substantially higher box office receipts, without undue burden on the patron, these larger theatres can, should and do pay higher rentals than theatres in small towns (R. 705). The fact that these initial runs pay higher license fees is of course reflected in the lower fees which can be and are charged to smaller first-run theatres in smaller cities and towns

[11] On a very unusual picture the number of prints may be larger. Thus there were some 500 prints of the feature GONE WITH THE WIND (R. 415); on less attractive features the number may be as small as 150 (R. 670).

and to subsequent runs everywhere. Indeed, the license fees progressively decrease, until the majority of the theatres actually pay less than the print cost (R. 671).[12] "Many of the bookings are for less than the cost of the print so that exhibitions would be confined to the larger high-priced theatres unless a system of successive runs * * * is adopted * * *" (Finding of Fact No. 74, R. 3673).

After the initial engagements, a feature is circulated as rapidly as physically possible to other theatres, usually to first-run theatres in smaller communities before returning to the larger city for second and subsequent run engagements. No print is kept idle during this period: except for the minimum of time required in shipment, handling and inspection, each is constantly in use for the first 12 to 14 months (R. 670). The bulk of the revenue from a feature is concentrated in the first few months, and the life expectancy of a print is 18 to 24 months (R. 672). This system "permits the public to see the picture in a later exhibiting theatre at lower than prior rates" (Finding of Fact No. 76, R. 3673).

As a result of this system of staggered engagements, characteristic of and essential to all film distribution, a lapse of some period is unavoidable between the opening of the first exhibition in a trade area and the availability of a print for every exhibitor in that area. This time lag, an inherent factor in motion picture distribution, exercises an unusual influence upon the habits of exhibitors and motion picture patrons. Each feature, after all, differs from all which have gone before and all which will come after.

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[12] For example, Warner's PRINCESS O'ROURKE, its feature with the greatest number of exhibitions in 1943-44 had 14,090 bookings, 12,926 of which were for an average fee of $78.40 (R. 1560).

A distributor can roughly classify a feature as to its probable attractiveness on the basis of the talent employed and the investment committed, but he knows, as plaintiff's counsel conceded at the trial, that he "cannot attempt any evaluation of these films in any other terms than what they actually produce at the boxoffice. There are no standards * * * by which any of us can judge them aesthetically * * *" (R. 14).

Because it is impossible to determine in advance the probable public appeal of any particular feature, exhibitors perforce rely upon the impersonal test of the competitive market as shown by the ability of a feature to attract patronage in the early runs in the larger cities. Subsequent-run exhibitors in the city and all exhibitors in smaller cities and towns follow closely trade journal reports, newspaper reviews, and other sources of information as to the features' acceptance at the large city first-runs. Thus they are able to judge the box-office value of the feature often before they license it, and in any event before they "book" it for their theatres.[18] "In general, trade shows, which are designed to prevent blind selling, are poorly attended by exhibitors" (Finding of Fact 98, R. 3677).

So it is that in a market of this type the producer-distributor recognizes that the success of any feature, no matter how artistic and expensive, is directly related to the public reception of its initial exhibition in the "showcase" theatre of each commercial trade center. First-run advertising and word-of-mouth advertising benefit the first-run exhibition in the adjacent territory and the subsequent-run exhibition everywhere (R. 681, 1387, 1513).

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[18] The term "book" refers to the setting of a date on which a given feature will be exhibited in a particular theatre (R. 559, 669).

Wherever possible, RKO as a distributor times this initial exhibition in close correlation with the results of widespread public surveys. These surveys indicate the period during which the opening of the exhibition will have the maximum public interest. The entire national advertising campaign is pointed toward this date. Local advertising campaigns are timed to coincide. This local campaign, to contribute most significantly to the success of the feature, must be varied in extent and nature depending on the needs of the particular feature (R. 1634-35). In Manhattan, for example, RKO's local advertising in support of its "showcase" theater almost invariably equals or exceeds its film rentals, so that the feature goes to the second-runs before RKO begins to earn revenue (R. 1646). Thus the support and cooperation of the exhibitor is of the utmost importance and is most effective when the exhibition is in an RKO "show-case" theatre (R. 1625-26, 1634-35, 1693).

The Findings quoted above give recognition to these factors.

b. *Financial stability*

Its theatre operations contribute to RKO's over-all financial stability. RKO has had financial difficulties. The depression which followed shortly after its organization caused RKO disastrous losses. Without its theatres RKO probably never could have emerged from its reorganization, and in the early years after its release from the courts could not have continued to operate (R. 1618).

The business of producing motion pictures necessarily entails substantial financial risks (R. 611, 1619). A large studio capable of producing a steady flow of quality features must have numerous departments, staffed by experts,

to handle such diverse subjects as talent, story, scenario, music, casting, research, design, makeup, costume photography and sound (R. 622, 1795). Such studios represent investments of millions of dollars (R. 622). The cost of producing features has increased tremendously during the past thirty-five years (Tr. 611, 672, 1261). Typical average cost per feature have been, in 1935-36, $376,014; in 1940, $430,000; in 1943-44, $1,250,000; and in 1945, $1,350,000 (Tr. 1548, 1550, 1570). These contrast sharply with the $40,000 to $60,000 production cost which was customary about 1915 (R. 611). Furthermore, these are average costs. A so-called "A" feature will frequently cost $3,000,000, as against $1,500,000 ten years ago (R. 611, 625-26).

To the production cost must be added the distribution expense. The cost of prints is treated as a part of the distribution expense. The total cost of black and white prints prior to the trial was from $25,000 to $97,500 per feature; for color prints, from $100,000 to $250,000 (R. 671, 1895-96). When all expenses are added, distribution cost will total one-half or more of the production cost (R. 1568-69).

Large sums are thus invested in recording an idea which cannot be tested in advance and which may not win public favor. An independent producer normally makes only one feature at a time. He usually rents studio space, borrows or hires talent, and has little fixed investment. He can enter production in boom years and withdraw when business is bad (R. 1619). The companies like RKO on which the individual exhibitor depends for a day-to-day supply must plan a program which will produce a continuous flow of pictures. This program is scheduled a year to eighteen months in advance (R. 673, 1619). Thus their total investment is pyramided upon producers such as RKO, who must build an inventory of finished features (R. 1619). Fre-

quently a high cost production grosses substantially less than its cost (R. 647, 742-43). The history of the industry has many examples of box office failures which certainly were expected, and often seemed entitled artistically, to win box office acceptance. Any producer who undertakes to underwrite a continual output of features, therefore, is likely from time to time to be faced with unprofitable pictures (R. 1619).

Added to the risks of the domestic market are the unforeseeable hazards of the international situation. Upwards of 30% of RKO's total revenues has come from foreign markets, and features are produced in expectation of this revenue (R. 1620). Over a long period of time the foreign market has contributed the bulk of the profit (R. 1569-1571; 1620). In the present condition of world commerce, of which this Court can take judicial notice, no producer can plan with assurance upon a free flow of funds from the foreign to the domestic bank account. The recent confiscatory tax of 75% of revenues imposed by England is only the most publicized instance of trade barriers which have been erected, often without warning, to destroy the profit potential of a producer.

The theatre business, on the other hand, is relatively stable and predictable. In no year between 1935 and 1945 did the attendance at RKO theatres vary 5% from the average (R. 1617, 1618). While RKO lost $5,000,000 in its production and distribution operations between 1938 and 1942, it made $9,000,000 on its theatre operations during the same period (R. 1618). Ultimately, of course, the success of any producer depends "on his ability to create a box office picture, to build something that the public is interested in, and will pay to go to see" (R. 657). But the assurance of a stable revenue offsets some of the produc-

tion risks and makes possible experimentation with new types of features (R. 1613-23, 1624).

2. RKO's operation as an integrated unit does not effect a restraint upon competition at any level of the industry.

The fact that RKO can operate more efficiently and serve the public more effectively as an integrated unit having an interest in the production, distribution, and exhibition of feature pictures does not impair the ability of its non-integrated rivals to compete successfully at each level of the industry. The Court below concluded that certain trade practices in distribution and certain local exhibition arrangements and investments violated the Sherman Act. These conclusions are assigned as error. But even if such conclusions were not challenged, the fact is clear that such violations were not the result of integration. The Court found:

> "In localities where there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of the competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants" (Finding of Fact No. 153, R. 3690).
>
> "The illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producer-distributors, but in admission price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations

among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited" (Finding of Fact No. 154, R. 3690).

"Total divestiture would be injurious to the corporations concerned and would be damaging to the public" (Finding of Fact No. 155, R. 3690).

"Total divestiture would not remedy the price-fixing, systems of clearance, formula deals, master agreements and franchises, block-booking, pooling agreements and the other practices which have been found unreasonably to restrict competition" (Finding of Fact No. 156, R. 3690).

The record fully sustains these Findings:

a. *Production*

Independent producers have demonstrated their ability to compete successfully with the integrated producer-exhibitor companies. For ten years prior to the trial the number of independent producers and productions had been increasing (R. 639, 1263). A list of successful features produced independently during the years before the trial is in evidence (Columbia Ex. C-4). At the time of the trial there were some 40 independent producers in Hollywood alone (R. 639-41). Those who do not have their own studios make extensive use of the studio facilities and equipment of the defendants and others, which are available for reasonable rentals (R. 651, 1533, 1534, 1802, 1803). Established stars, feature players, and other production personnel are amply available in the free lance market (R. 797-99). Where

particular personalities are under contract and are peculiarly suitable for certain roles, there is a wide loan of talent in which independent producers freely share (R. 1801-02, 1261-62, 1529-30, 637-39). Thus independent producers have been and are able to compete successfully without high overhead either in fixed investments or talent contracts.

Distribution of independently produced features is normally handled through one of the eleven national distributors. No worthwhile independently produced feature has failed to secure such distribution (R. 1263-66). RKO relies heavily on independent producers to fill out its supply of product, and in the five seasons prior to the trial from 15.7% to 41.3% of the features it distributed were independently produced and yielded from 30.9% to 40.6% of its gross distribution revenue (R. 1649, RKO Ex. 5).

On this showing the plaintiff conceded that it could not show any monopoly in the field of production (R. 1952), and the Court found:

> "There exists active competition among the defendants and others in the production of motion pictures" (Finding of Fact No. 59, R. 3670).
>
> "None of the defendants has monopolized or attempted to monopolize or contracted or combined or conspired to monopolize or to restrain trade or commerce in any part of the business of producing motion pictures" (Finding of Fact No. 60, R. 3670).

b. *Distribution*

At the time of the trial there were eleven national distribution organizations (R. 544). Of the total of 442 features released through all distributors in 1944, RKO dis-

tributed 28 produced by itself and 9 produced by others (RKO Ex. 2). The 37 features handled by RKO represented but 8.4% of the total. No one can seriously contend that RKO has the power to dominate or control the market in distribution.

Furthermore, the integrated structure of RKO does not deny any distributor access to its theatres. As found by the Court below, it would be financially impossible for RKO to operate its theatres on RKO features alone (Finding of Fact No. 102, R. 3678). RKO theatres therefore must license features from other distributors to fill the time not used in exhibiting RKO's own features.

Naturally RKO, like every other exhibitor, seeks to license the best product available (R. 1655). This policy necessarily limits it largely to the eleven distributors with national release organizations, since the features distributed by the so-called "states rights" exchanges are low-cost, low-quality productions (R. 660).

The source of the features exhibited by RKO reflects the fact that its theatres look to the product of the non-integrated companies for almost one half of their supply. During the 1943-44 motion picture season RKO's 93 theatres which operated on first-run and (in the New York metropolitan area) first-neighborhood-run played 10,376 feature engagements[14] (RKO Ex. 8). Of these, a little less than one-fourth (23.1%) were exhibitions of RKO's own releases, and nearly one-half (47.3%) were exhibitions of features released by distributors which did not operate theatres. If Fox, Warner, Loew's and Paramount, the other theatre owning defendants, are aggregated, less than

[14] In this tabulation, each engagement of a feature in each theatre is counted separately. Thus, if a Columbia feature is exhibited in five RKO theatres, this would be tabulated as five feature engagements.

three feature exhibitions in each ten in these RKO theatres (29.6%) were licensed from them (Finding of Fact No. 137, R. 3687). In licensing the product of a distributor which is affiliated with theatres, RKO has no understanding, express or implied, that such distributor's theatre operating executives will give RKO features any preference for such theatres (R. 1659).

c. *Exhibition.*

In 1945 there were approximately 18,000 theatres operating in the United States: RKO operated 1 in each 167. The estimated weekly theatre attendance was 95,000,000 customers: about 1 in 50 went to an RKO theatre. The estimated weekly box office receipts were just under $25,000,000: about $1 in each $40 went to an RKO theatre (Tr. 1611, RKO Ex. 2).

RKO operates first-run theatres in 25 of the 92 cities of the United States with a population of 100,000 or more (RKO Ex. 7). There are 175 first-run theatres in these 25 cities, of which RKO operates only 47. In every city where RKO operates such a first-run theatre, with one exception, there are competing first-run theatres in which it has no interest[15] (Appendix A), and in all such cities there is additional competition from theatres operating on other runs (Finding of Fact No. 147, R. 3688).

In the four largest boroughs of New York City RKO operates 36 theatres. The Palace is a relatively small first-

[15] At the time of the trial RKO operated in Cincinnati, Ohio seven first-run theatres and had a minority interest of 15.4% in the United Theatre Corp. which operated the Keith, a first-run theatre. The minority interest in the Keith has since been sold to an operating company in which RKO has no interest (Report of Compliance, July 1, 1947).

The exception is Grand Rapids, Michigan, where the competing first-run theatres are operated by W. S. Butterfield Theatres, Inc. in which RKO has a 10% interest. See Appendix A.

run theatre in the highly competitive Times Square theatre area.[16] The remainder, scattered over the metropolitan area, are surrounded by theatres competing on the same or subsequent runs. Using a radius of one-half mile to embrace the area of most intense competition, the number competing with each RKO theatre averages 6.4 theatres. Only one of RKO's theatres is without competition within this distance, and only four have but one theatre competitor in this area; whereas the number rises as high as 18 in one case, and 17 in another. If the radius is extended to one mile, to cover an area of substantial competition, the average number of theatres competing with each RKO theatre rises to 15. No RKO theatre has less than two competitors within this distance, and the maximum rises to 36.[17] For a summary tabulation, see Appendix B.

Nor do the RKO theatres in New York dominate their respective competitive areas in seating capacity. Only seven of the 35 theatres have as much as one-half the seating capacity in a competitive area defined by a half mile radius, only one has as much as half the capacity in an area defined by a one mile radius. At the other extreme, fifteen have 10% or less of the seating capacity in the one-mile radius area where they are located (See Appendix B).

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[16] Seating capacities of representative first-run theatres in the Times Square area:

Music Hall	5949 seats	Palace	1707 seats
Roxy	5886 seats	Hollywood	1587 seats
Capitol	5486 seats	Globe	1416 seats
Paramount	3664 seats	Winter Garden	1350 seats
Rivoli	9092 seats	Astor	1141 seats

[17] In some instances, the competitive areas thus outlined will overlap where two RKO theatres are less than two miles apart. The resulting duplications are not sufficiently numerous to affect the figures materially.

F. Minimum admission price provisions in film license contracts.

The above fact statement is directed to RKO's theatre holdings and operations, pertinent to Points I and II of its Argument as Appellant, dealing with the Decree's prohibition of expansion and of joint interests; and to Points VI, VII and VIII of its Argument as Appellee, dealing with the plaintiff's demand for divestiture. Additional facts pertinent to the material in the Government's Brief are stated in RKO's Argument as Appellee.

Points III and IV of RKO's Argument as Appellant consider the legality of license contract provisions as to the minimum admission price to be charged during the exhibition of the feature licensed. The relevant facts are subdivided into those related: 1. To the distribution of ordinary features; and 2. To the roadshowing of unusual features.

1. Minimum admission prices in licenses of ordinary features.

Feature motion pictures may be classified as "ordinary" and "extraordinary" features. Extraordinary features include the small number of productions which, because of outstanding cast, unusual cost, extra length, and similar distinguishing characteristics, are "roadshown," often with reserved seats. Ordinary features are those which are handled in the normal routine of distribution.

All features distributed by RKO are copyrighted (R. 658). "In the distribution of feature motion pictures no film is sold to the exhibitor; the right to exhibit under copyright is licensed" (Finding of Fact No. 61, R. 3670). The

practice of licensing film, as shown above, is the logical and economical way to distr bute a feature film.

Long prior to 1920 distributors began to provide in the license agreement that the licensee should not charge less than a specified minimum admission price during the exhibition of the feature licensed (R. 439-40, 612, 717, 1723). Neither in origin nor in continued use did this practice have any relation to the fact that some distributors owned or operated theatres. It originated, indeed, before any defendant owned theatres (R. 612, 717-28, 916-17; P. Ex. 6).

The distributor has a direct and substantial interest in the minimum admission price to be charged during the period while the distributor's picture is being exhibited. The distributor's commercial problem is to license the feature on terms which will produce from each theatre a fair license fee and which will, in the aggregate, recoup the costs of production and distribution and a reasonable profit. The task requires the application of judgment to a complicated set of facts. The negotiation of a license fee for a particular feature for exhibition in a particular theatre involves the evaluation of numerous factors: for example, the location and seating capacity of the theatre, the quality of its housing and equipment, the exhibitor's playing policy, the sequence of runs in the competitive area, the box office attractiveness of the feature, the admission price to be charged, and the age of the picture.[18]

With the possible exception of the factor of admission price policy, the relation of the enumerated factors to the license fee is obvious. But the relevancy of the admission

[18] The age factor is illustrated by the fact that during the week ending Oct. 13, 1945, Fox product billings were:

Features released in	1945-46 season	1,642	billings
" "	" 1944-45 "	4,547	"
" "	" 1943-44 "	493	"

(R. 1118)

price is equally indisputable. The relationship is clearest, of course, where the license fee is set as a stipulated percentage of the exhibitor's gross receipts. On the more attractive features such percentage terms are employed for two reasons. First, such a feature will normally be in the upper bracket of production cost, and it is difficult if not impossible to distribute it profitably on flat rentals (R. 430). Secondly, the percentage arrangement affords the distributor an opportunity to participate in the outstanding business which an exhibitor may do on the basis of the unusual excellence of the feature (R. 431). When features are distributed on a flat rental, however, the negotiation of its amount must turn, in part at least, on the parties' estimates of the probable gross (R. 725, 726).

The distributor can make his necessary estimates on any admission price the exhibitor may set for the period during which the feature is to be shown, but no distributor could form any intelligent guess as to the reasonable and fair license fee if the distributor had no idea of the admission price to be charged by the theatre when the feature was to be exhibited.

Accordingly, RKO in its negotiations has asked the exhibitor what admission he proposed to charge during the exhibition of a feature licensed and has incorporated this representation in a license provision specifying that during such exhibition he shall not charge less. Further, RKO's license form in use at the time of trial provided that if no higher admission price was written in, the exhibitor should charge not less than 10 cents in the afternoon and 15 cents in the evenings during the exhibition of the feature licensed (R. 1723). This was a nominal provision, since substantially all exhibitors charged more, and was looked upon as

a matter of self-protection, since the charging of admission prices below 10¢ and 15¢ would debase motion picture entertainment and ultimately would hurt both the exhibitor and RKO (R. 1723).

The undisputed evidence shows that exhibitors have found, as a matter of good business practice, that they can best operate their theatres upon an admission price policy which does not vary from picture to picture or day to day. To see-saw prices would be unworkable and unsatisfactory both to the exhibitor and the public (R. 723, 969). Hence, an exhibitor normally continues on an established policy until conditions warrant a change, and then raises or lowers his price to set a new policy which he follows until another general change is indicated. It is also undisputed that the minima specified were the exhibitors' established scales of prices (R. 433, 718, 968, 999, 1382-83, 1723). Frequently the exhibitor established prices in excess of the minima (R. 725, 1001).[19] There is no evidence that RKO, or any other distributor, ever suggested a change of admission prices on ordinary features, or ever made any agreement as to the admission price to be charged at any time other than during the exhibition of its own feature then being licensed.

In specifying a minimum admission price to be charged during the exhibition of the feature licensed, RKO did not take into consideration whether or not the exhibitor was affiliated with any of the defendants in this case (R. 1723). Furthermore, the evidence shows affirmatively that RKO by the stipulation of admission prices in subsequent-run

[19] For example, Loew's made a study of the price policy followed in 3237 theatres exhibiting one of its better features, and found that in 346 instances, or nearly 11%, the prices exceeded the minima specified (R. 434).

license contracts did not discriminate in favor of prior-run theatres affiliated with any of the defendants.[20] RKO had no understanding or agreement, written or oral, with any exhibitor concerning the admission prices which RKO would require any other exhibitor to charge on features licensed to such other exhibitor (R. 1724).

2. Minimum admission prices in licenses of extraordinary features.

From time to time producers have created unusual features which have been licensed for a limited number of "roadshow" engagements at advanced admission prices prior to general release (R. 720, 952). The roadshow practice is characterized by the following attributes: (a) the feature involved has an unusually high production cost and is generally much longer than the ordinary feature; (b) the feature involved is exhibited as a roadshow in only a limited number of theatres and not on the usual run and clearance basis; (c) the license fee is based on a percentage of gross receipts; (d) each license contract for the feature stipulates a minimum admission price to be charged by the licensee during the exhibition of the feature which is higher

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[20] The RKO feature in the 1943-44 season which had the greatest number of domestic billings, LADY TAKES A CHANCE, was exhibited on first-run in *affiliated* theatres and on subsequent-run in *unaffiliated* theatres in 62 cities of over 50,000 population. Only 2.3% of the subsequent-run license contracts with the unaffiliated theatres stipulated an admission price of 40¢ or more (RKO Exs. 20, 21). On the other hand, the same feature was exhibited on first-run in *unaffiliated* theatres in 71 of the cities with over 100,000 population and in 4.6% of the subsequent-run exhibitions in *unaffiliated* theatres an admission price of 40¢ or more was stipulated in the license contracts with the subsequent-run exhibitors (RKO Exs. 22, 23).

than the usual admission price; (e) a considerable period of time elapses between the conclusion of the roadshow exhibition and the time when the feature is made available for general release; and (f) due to the unusual cost and character of the feature, it cannot be distributed as advantageously by resort only to the normal method of distribution (R. 720-21, 1125-26, 1203, 1725).

The use of roadshow licenses is not a frequent practice, but is of importance to producers who wish on occasion to attempt more ambitious releases than are possible on ordinary production budgets. During the five years before the trial only six such features were roadshown by defendants. The six were *For Whom the Bell Tolls, Northwest Mounted Police, Reap the Wild Wind, Gone With the Wind, Wilson,* and *Song of Bernadette* (R. 720, 1124, 1125, 1927). None of these pictures was distributed by RKO.

There is no evidence which suggests that the defendants have combined or conspired concerning the distribution or exhibition of such unusual features.

ARGUMENT FOR RKO APPELLANTS IN CAUSE NO. 80

Specification of Errors to be Urged

The following errors are urged herein:

1. The Court erred in Section III, Paragraph (6) of the Decree in enjoining RKO from expanding its present theatre holdings in any manner whatsoever except as permitted in Section III, Paragraph (5) of the decree.

2. The Court erred in denying Paragraph I of RKO's Motion to Amend and Modify the Decree so as to make Paragraph (6) of Section III thereof read as follows:

> "'From expanding its present theatre holdings in any manner whatsoever, except as permitted in the preceding paragraph; or except for the purpose of acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field, if such defendant shall show to the satisfaction of the Court, and the Court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures. Reasonable notice of the intention to make any such acquisition shall be served upon the Attorney General and the plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the Court.'"

3. The Court erred in Section III, Paragraph (5) of the Decree in requiring RKO to terminate its investments amounting to over 5% and less than 95% in certain local theatre holding and operating companies either by selling

its interest or by acquiring (with court approval) the interest of others.

4. The Court erred in Section II, Paragraph (1) of the Decree in enjoining RKO:

> "1. From granting any license in which minimum prices for admission to a theatre are fixed by the parties, either in writing or through a committee, or through arbitration or upon the happening of any event or in any manner or by any means."

5. The Court erred in failing to provide for a nation-wide system of impartial arbitration tribunals to secure adequate enforcement of whatever general and nation-wide prohibitions of illegal practices may be contained in its decree, as prayed in the Amended and Supplemental Complaint and as provided in the Consent Decree of the parties of November 20, 1940.

Other errors assigned by RKO are covered in the Briefs of the other appellant defendants. Though they are urged, RKO will not separately brief or comment on them.

I.

The District Court erred in enjoining RKO from expanding its present theatre holdings.

Paragraph (6) of Part III of the Decree (R. 3700) enjoins RKO and the other four exhibitor-defendants "From expanding its present theatre holdings in any manner whatsoever except as permitted in the preceding paragraph." The "preceding paragraph" enjoins the own-

ership by a defendant of a beneficial interest in a theatre in conjunction with another exhibitor, affiliated or independent, unless such interest is 5% or less or 95% or more; and provides that a defendant, in dissolving such relationships, may acquire his co-owner's interest upon showing to the Court's satisfaction that the acquisition will not unduly restrain competition in exhibition.

The three defendants who were not operating theatres at the date of the trial are left free to build up theatre circuits, perhaps from some of the sales forced on their co-defendants.

The exhibitor defendants moved the Court to amend Paragraph (6), Part III, to read as follows:

> "From expanding its present theatre holdings in any manner whatsoever, except as permitted in the preceding paragraph; or except for the purpose of acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field, if such defendant shall show to the satisfaction of the Court, and the Court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures. Reasonable notice of the intention to make any such acquisition shall be served upon the Attorney General and the plaintiff shall be given an opportunity to be heard with respect thereto before any such acquisition shall be approved by the Court" (R. 3704).

The Court denied this Motion (R. 3719), and appeal was taken from this Order as well as the Decree (R. 3726).

The RKO defendants contend that the absolute prohibition upon expansion is an abuse of discretion, because:

A. It is unnecessary and inappropriate in view of the type of conduct of RKO which the Court found violative of the Sherman Act.

B. It decreases rather than promotes legitimate competitive activity of the RKO defendants, and thus is inconsistent with the objectives of the Sherman Act.

It is RKO's position that the Decree should not prohibit the expansion of its theatre holdings; but that if any provision on the subject is warranted, it should be substantially in the form as quoted from the Defendants' motion to amend the Decree.

A. The prohibition upon theatre expansion is unnecessary and inappropriate in view of the type of conduct of RKO which the Court found violative of the Sherman Act.

1. The appropriate function of a decree in an antitrust case is to grant such relief, and only such relief, as will prevent and restrain the continuance or the repetition of violations of the Act of the type which have occurred.

The District Court has jurisdiction to "prevent and restrain" violations of the Act (Sherman Act, §4). The Court exercises this jurisdiction "according to the general principles which govern the granting of equitable relief." *DeBeers Mines* v. *United States*, 325 U. S. 212, 218-219 (1945). In framing a decree the "fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statutes rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." *Standard Oil Company* v. *United States*, 221 U. S. 1, 78 (1911).

While precedents in antitrust cases "cannot be much more than guides," nevertheless this Court has formulated the criterion to be applied: "The essential consideration is that the remedy shall be as effective and fair as possible in preventing continued or future violations of the Antitrust Act in the light of the facts of the particular case." *United States* v. *National Lead Co.*, 332 U. S. 319, at 335 (1947).

The test of propriety of a decree provision under Section 4 is "whether or not the required action reasonably tends to dissipate the restraints and prevent evasions." *United States* v. *Bausch Lomb Co.*, 321 U. S. 707, 726 (1944). "Past unlawful competition does not deprive the parties of the right to conduct lawful competition." *United States* v. *Standard Oil Co. of New Jersey*, 173 Fed. 177, 192 (C. C. E. D. Mo., 1909) aff'd 221 U. S. 1 (1911). The court may not "impose penalties in the guise of preventing future violations," or "create, as to the defendants, any duties, prescription of which is the function of Congress," or "place the defendants, for the future, in a different class than other people," or "enjoin all possible breaches of the law," or "cause the defendants hereafter not to be under the protection of the law of the land." *Hartford Empire Co.* v. *United States*, 323 U. S. 386, 409, 410 (1945); *Swift and Co.* v. *United States*, 196 U. S. 375, 396 (1905). See also *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 435 (1941). Accord: *United States* v. *National Lead*, 332 U. S. at 338: "This is a civil, not a criminal proceeding. The purpose of the decree • • • is effective and fair enforcement, not punishment."

It is not argued that a decree must deal only with the precise type of unlawful acts found to have existed. But when the special facts of the particular case justify a some-

what broader scope for the injunction, judicial discretion is not left wholly unfettered. The decree can only "forbid the doing in the future of acts *like those* which we have found to have been done in the past which would be violative of the statute." *Standard Oil Company* v. *United States*, 221 U. S. 1, 77-78 (1911) (italics supplied). It should enjoin only "acts of the *sort* that are shown by the evidence to have been done or threatened in furtherance of the conspiracy." *Local 167* v. *United States*, 291 U. S. 293, 299 (1934) (italics supplied). The recent decision in *International Salt Co. Inc.* v. *United States* (Docket No. 46, Opinion Nov. 10, 1947) is not inconsistent in any way with the principle of these cases. Discrimination in leases of patented machines in the past was taken as proved, and the majority of this Court determined that a prohibition upon discriminations in future sales or leases was sufficiently closely related to be sustained. "The usual ways to the prohibited goal may be blocked against the proven transgressor," said Mr. Justice Jackson for the majority. This does not even approach an infringement of the doctrine that the relief must be fitted and limited to "effective and fair enforcement, not punishment."

2. The relief granted by the Decree adequately and effectively remedies the illegalities found without the necessity of prohibiting absolutely any theatre expansion.

It is not conceded here that any of RKO's acts violated the Sherman Law, but, even assuming *arguendo* that the trial court was correct in its various conclusions, it is clear that the absolute prohibition upon any future expansion is both unnecessary and inappropriate, and hence is an abuse of discretion.

RKO's acts which were deemed violative of the Sherman Act were of three general types:

First, *the eight distributor defendants* (*three of whom had no theatres*) were found to have conspired with each other and with their respective licensees (*both affiliated and independent*) to establish a nationwide system of fixed theatre admission prices, runs and clearance (Findings of Fact Nos. 64, 65, 70, 71, 79, 81, R. 3671, 3672, 3674; Conclusions of Law Nos. 7(a)(b), 8(a)(b)(c), 9(c)(d), R. 3692, 3693). The Court further found that certain license agreement terms, *whether made with affiliated or independent exhibitors*, constituted illegal restraints, such provisions being enumerated in Finding of Fact No. 110[21] (Findings Nos. 79, 86, 88, 89, 93, R. 3674-6; Conclusions Nos. 8(d)-8(h), 9(d), 10 and 11, R. 3693-4).

The violations, if any, embraced in this general type of activity were specifically enjoined. The following tabulation sets forth each violation found and the corresponding relief granted in the Decree and shows in detail the manner in which the Decree deals with each practice found to have been unlawful:

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[21] The Court's Finding of Fact No. 110 (R. 3681) reads as follows:

"110. Various contract provisions by which discriminations against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits were accomplished are: . . . [enumeration omitted] These provisions are found most frequently in franchises and master agreements, which are made with the larger circuits of *affiliated and unaffiliated* theatres. Small independents are usually licensed, however, upon the standard forms of contract, which do not include them. The competitive advantages of these provisions are so great that their inclusion in contracts with the larger circuits constitutes an unreasonable discrimination against small competitors" (Italics added).

Violations	*Relief Granted*
(a) All the defendants violated Section 1 and Section 2 of the Sherman Act by	
1. Aequiescing in the establishment of a price fixing system by conspiring with one another to maintain theatre admission prices.	Distributors enjoined from granting any license in which minimum admission prices are fixed by the parties (Part II, Par. 1 of the Decree).
2. Conspiring with each other to maintain a nation-wide system of runs and clearances which is substantially uniform in each local competitive area. (Conclusion of Law No. 7)	Distributors enjoined from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances (Part II, Par. 2 of the Decree) and from licensing in the future in any manner except pursuant to a prescribed procedure under which any exhibitor may, if he so desires, bid for any picture on any run he chooses (Part II, Par. 8 of the Decree).
(b) The distributor-defendants violated Section 1 and Section 2 of the Sherman Act by	
1. Conspiring with each other to maintain a nation-wide system of fixed minimum motion picture theatre admission prices.	Same as (a)1 above.
2. Agreeing individually with their respective licensees to fix minimum motion picture theatre admission prices.	Same as (a)1 above.

Violations	*Relief Granted*
3. Conspiring with each other to maintain a nation-wide system of runs and clearances which is substantially uniform as to each local competitive area.	Same as (a)2 above.
4. Agreeing indiyidually with their respective licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits as found in finding No. 110 above.	Distributors enjoined from licensing in the future in any manner except pursuant to prescribed procedure under which any exhibitor may, if he so desires, bid for any picture on any run he chooses (Part II, Par. 8 of the Decree).
5. Agreeing individually with such licensees to grant unreasonable clearances against theatres operated by their competitors.	Distributors enjoined from granting any clearance between theatres not in substantial competition and from granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted (Part II, Pars. 3 and 4 of the Decree).
6. Making master agreements and franchises with such licensees.	Distributors enjoined from making and further performing master agreements and franchises (Part II, Pars. 5 and 6 of the Decree).

Violations	*Relief Granted*
7. Individually conditioning the offer of a license for one or more copyrighted films upon the acceptance by the licensee of one or more other copyrighted films, except in the case of the United Artists Corporation.	Each license must be offered and taken, theatre by theatre, and picture by picture (Part II, Par. 8(d) of the Decree).
8. The defendants Paramount and RKO making formula deals. (Conclusion of Law No. 8)	Distributors enjoined from making or further performing any formula deal (Part II, Par. 6 of the Decree).
(c) The exhibitor-defendants violated Section 1 of the Act by	
1. Conspiring with each other and with the distributor-defendants to fix substantially uniform minimum motion pictures theatre admission prices, runs, and clearances.	Same as (a)1 and 2 above.
2. Conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission price, run, clearance and other license terms. (Conclusion of Law No. 9)	Same as (b)4 above.

The second type of violation related to the joint operation of certain theatres—so-called "pooling" arrangements and percentage leases (Findings of Facts Nos. 112, 113, 114, R. 3682; Conclusion of Law No. 9(a), R. 3693).

Full relief was given on this aspect by the Decree's requirement that all such pools be dissolved and all such leases be terminated by July 1, 1947, the final date set by the Decree as modified (R. 3720), plus an injunction against any future such pools or leases. Pursuant to the Decree, RKO has dissolved the few "pool" situations in which it was interested and has terminated—at the expense of having to sell the theatres involved—the five percentage leases it had at the time of the trial.

The third type of violation related to the joint ownership of theatre operating companies (Findings of Fact Nos. 115, 116, 117, R. 3682-3; Conclusion of Law No. 9(b), R. 3693).

These Findings and this Conclusion are questioned in Point II below, but in any event full relief was accorded here by enjoining future investments of the type involved, and directing RKO to increase its interest (with court approval) to 95% or more, or to decrease its interest to 5% or less, within two years.

Clearly the prohibition upon expansion has no relation to any of the violations found.

3. The absolute prohibition on theatre expansion improperly restrains a lawful act merely because the Court found that unrelated unlawful acts had been committed in the past.

Prior decisions of this Court make it clear that a *lawful* act cannot properly be restrained in the future merely because unrelated *unlawful* acts have been committed in the

past. True, an act which, though *per se* legal, is a part or instrumentality of a conspiracy violative of the statute or which would be a "usual road" for continuing a past illegality may be enjoined if necessary to restrain the continuance of such conspiracy. *International Salt Co., Inc.* v. *United States, supra; Swift & Co.* v. *United States, supra.* But the injunction must be aimed at the illegal conduct and cannot broadly prohibit unrelated acts which, in the absence of conspiracy, are perfectly lawful. In *Hartford-Empire Co.* v. *United States, supra,* the lower court's decree prohibited the defendants from disposing of, or transferring the possession of, glass making machinery other than by an outright sale. This Court stated (p. 413):

> "* * * The injunction as drawn is not directed at any combination, agreement or conspiracy. It binds every defendant forever irrespective of his connection with any other or of the independence of his action."

The force of these guiding principles cannot be deflected, in the present case, by an argument, grounded perhaps on the *International Salt* case, and based on the particular theatre activities condemned below. True, RKO has made certain investments in companies operating theatres, and has in a few instances entered into operating agreements relating to two or more theatres. True, also, the lower Court declared these investments and operating agreements to be unlawful. But the lower Court specifically found that "the illegalities and restraints herein found, are not in the ownership of many or most of the best theatres by the producer-distributors" (Finding of Fact 154, R. 3690, quoted in full, *supra*).

The Court made no Finding or Conclusion, and there is no evidence which indicates, that RKO violated the Sher-

man Act in the acquisition of a 100% interest in any theatre in any locality or by acquiring a partial interest in any theatre in conjunction with a person who is not an exhibitor. On the contrary, the Court specifically found that RKO's exhibition activities increased competition in the cities in which its theatres were located (Finding of Fact No. 121, R. 3684), and by the Decree permitted, when approved by the court, the acquisition of additional interests in theatres in which RKO at the time of trial had any beneficial interest between 5% and 95%.

There is no evidence and no Finding or Conclusion that RKO ever acquired any theatre interest through predatory practices. Indeed, the plaintiff specifically excluded from the issues below any claim of improper acquisitions. It contended that "Whether or not particular theatres were originally acquired by tactics sometimes described as predatory or by more conventional means is of no moment, in view of the clearly illegal character of the producer-exhibitor combinations that have resulted, in and of themselves" (Plaintiff's Trial Brief, p. 25).

There is no evidence and no Finding or Conclusion that RKO through its theatres monopolized or conspired or attempted to monopolize trade or commerce in exhibitions either nationally or in any locality.[22] RKO's ownership of

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[22] The only Conclusion relating to monopolization by the exhibitor defendants is that they attempted to monopolize by (a) acquiescing in the establishment of a theatre admission price-fixing system and (b) conspiring to maintain a nation-wide uniform system of runs and clearances (Conclusion of Law No. 7, R. 3693). Even the joint ownership and operation of theatres with other exhibitors was condemned by the Court not on the basis that it was an attempt or conspiracy to monopolize but on the theory it constituted an unreasonable restraint of trade (Conclusion of Law No. 9, R. 3693).

0.6% of the theatres in the United States, with a weekly average attendance of 1.9% of the total attendance of all theatres, and receiving 2.6% of the estimated gross admissions of all theatres, would not support a finding of monopoly in exhibition. The fact that RKO during the period of the alleged conspiracy lost a large number of its theatres and that during the same time the number of independent theatres was increasing by several thousand is itself persuasive proof that RKO has no power to dominate in the field of exhibition.

There is no evidence, or any Finding or Conclusion, which indicates that RKO through its theatre operations has monopolized "any part" of interstate commerce. In each city in which RKO operates theatres there is competition from theatres in which RKO has no interest operating on the same or other runs. The facts as to competition are summarized in the Statement of the Case. Certainly the acquisition of a single theatre in some city in which it presently has none, especially when preceded by a hearing and court approval, could not possibly give RKO a local monopoly or unreasonably restrain trade in the area.

In its Opinion the Court recognized that "Each defendant had a right to build and to own theatres and to exhibit pictures in them" (Opinion p. 55, R. 3554). The denial of this right by the Decree is difficult to justify, particularly in view of the specific statement in the Opinion that the Decree should not "prevent a defendant from acquiring theatres or interests therein in order to protect its investments, or in order to enter a competitive field; if in the later case, this Court or other competent authority shall approve the acquisition after due application is made therefor" (Opinion p. 65, R. 3562). This intention clearly

remained unchanged at the time of argument upon the proposed Decree, as shown by the following colloquy (R. 3057-63):

> "Mr. Seymour: Now I will pass on, if I may to section 5 at the top of page 15. That is the injunctive provision dealing with future acquisitions. We have tried in our language to follow the Court's opinion. Mr. Wright has suggested an absolute ban on any future acquisitions. He says 'from expanding its present theatre holdings in any manner whatsoever.' Now, that is directly in the teeth of your Honor's opinion.
>
> Judge Hand: We are not going to have any such drastic provision as that. We considered that."

That the lower Court's original view correctly stated the maximum relief appropriate, and that the provision challenged here is improper, is clear from the analogy of prior decisions. In the *Hartford Empire* case, cited *supra*, the lower court's decree contained a prohibition upon expansion. It prohibited the defendants from acquiring, otherwise than through direct issue from the Patent Office, a patent right or a restricted license under any patent relating to glass making machinery. The Supreme Court held that this provision was inappropriate and should be eliminated. In *United States* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944) the lower court placed a ban upon expansion, prohibiting the defendants from acquiring any financial interest in any additional theatre outside Nashville in any town where there was already a theatre "unless the owner of such theatre should voluntarily offer to sell same * * * and when none of said defendants * * * are guilty of" predatory practices. See 323 U. S. at 185. The

United States, desiring a more restrictive provision, asked that the decree be modified to prohibit expansion "except after an affirmative showing that such acquisition will not unreasonably restrain competition." This Court granted the requested modification. Noting that the growth of the defendants had "been the result of predatory practices condemned by the Sherman Act" (323 U. S. at 186), this Court said: "Where the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct and yet not stand as a barrier to healthy growth on a competitive basis" (*Ibid.*). RKO, though operating a smaller number of theatres than the Crescent defendants,[28] and though specifically exonerated from any finding of predatory practices in theatre acquisitions and operation, is subjected to a more drastic decree than the court approved in the *Crescent* case.

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[28] See Findings and Conclusions, *United States* v. *Crescent Amusement Co.*, reprinted in Supreme Court Cause No. 662 (October Term, 1943) Record pages 1357-1363, tabulating the number of theatres operated by the Crescent defendants in 1939 as follows:

Crescent Amusement Co.	49	theatres
Muscle Shoals Theatres, Inc.	5	"
Lyric Amusement Co.	3	"
Cumberland Amusement Co.	13	"
Strand Enterprises*	21	"
Rockwood Amusement Co.	12	"
Cherokee Amusements, Inc.	11	"
Newport Amusement Co.	2	"
Kentucky Amusement Co.	1	"
	117	

*The Bill of Complaint was dismissed as to Strand. See Crescent Record, 1484.

Further analogy is to be found in the *National Lead* case, *supra*, wherein the government asked this Court to strike down the provision for compulsory patent licenses on reasonable royalties, and to substitute either an injunction against the enforcement of certain patents or a provision for compulsory royalty free licenses. The following quotation of the Court's language would, with a slight paraphrase involving no change of substance, fit the facts of the present case:

> "Assuming * * * that violation of the Sherman Act in this case has consisted primarily in the misuse of patent rights placing restraint upon interstate * * * commerce, that conduct is not before this Court for punishment. It is brought before this Court in order to secure an order for its immediate discontinuance and for its future prevention. That will be accomplished largely through the strict prohibition of future performance of the unlawful agreements. Further assurance against continued illegal restraints upon interstate * * * commerce * * * is provided through the compulsory granting * * * of licenses at uniform reasonable royalties * * *
> On the facts before us, neither the issuance of such licenses on a royalty free basis nor the issuance of a permanent injunction prohibiting the patentees and licensees from enforcing those patents has been shown to be necessary in order to enforce effectively the Antitrust Act * * *"

B. The absolute prohibition of theatre acquisitions by RKO restrains, rather than promotes, lawful competition and is inconsistent with the objectives of the Sherman Act.

It has been shown that the prohibition of future theatre acquisitions is inappropriate and unnecessary since it has no relation to the type of misconduct found by the court

below, and recurrence of such misconduct will be prevented by other provisions of the Decree. We consider now the impact of such a provision upon competition within the industry.

The Court found that at the time of the trial:

Paramount owned independently of the other defendants approximately	1395	theatres
Fox approximately	636	"
Warner approximately	501	"
Loew's approximately	135	"
RKO approximately	109	"

(Findings of Fact No. 118, R. 3684)

After all joint interests are dissolved, RKO will have substantially fewer theatres than any other exhibitor defendant with the possible exception of Loew's. There is, of course, no assurance whatever that RKO will be able to negotiate fair terms for the purchase of a co-owner's interest in any theatre, or if successful in such negotiations will receive the approval of the lower court. Furthermore, of the 106 theatres operated by RKO at the time of the trial, 51 were mere leases which RKO may or may not be able to renew at fair terms. Already, as noted below, controversy has arisen as to the rights of a defendant confronted by the loss of present theatre operations through such causes.

The result is that RKO by the flat prohibition upon expansion will be permanently frozen in an inferior position vis-a-vis the other theatre owning defendants and the large independent circuits. This is the very antithesis of competition. Moreover, the defendants Universal, Columbia and United Artists remain free to acquire theatres wher-

ever and whenever they may choose to do so. The closely held circuits involved in *United States* v. *Griffith*, now pending in this court, aggregated over 175 theatres. Even an independent circuit which had been convicted of predatory practices—practices of which RKO is not even accused—and which had more theatres than RKO, was left free to expand its theatre holdings with court approval. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944). The pattern set in that case has been followed by Judge Knight in *United States* v. *Schine*, in his order of July 5, 1946 (printed in the Statement of Jurisdiction, p. 38, in *Schine Chain Theatres* v. *United States* now pending in this Court). This case also involved a circuit of theatres much larger than that of RKO,[24] and a judicial finding of practices without parallel in the RKO record. Yet the lower court's decree also provided that: "No defendant shall acquire a financial interest in any additional theatres except after an affirmative showing that such acquisition will not unreasonably restrain competition." This is a reasonable pattern intended to preserve competition.

It is believed that the Decree does not prohibit the acquisition of a theatre in a new territory to replace a theatre disposed of or lost elsewhere, since on balance there would be no expansion. The plaintiff urges, however, that such an acquisition would violate the Decree. The failure of the Decree to deal specifically with this problem is an admirable example of a failure to meet the requirement suggested by the *International Salt* case, *supra*, that "It is desirable, in

[24] On May 19, 1942 the Schine circuit included 148 operating and 18 closed theatres, a total of 166. See Brief for Appellants, p. 4, in Cause No. 10, *Schine Chain Theatres, Inc.* v. *United States*, now pending.

the interests of the court and of both litigants, that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that the parties may know their duties * * *". RKO's dilemma is illustrated by the fact that during the pendency of this appeal the Government has asserted in open court (on an attempted civil contempt proceeding initiated by a local exhibitor) that a theatre owning defendant would violate the prohibition upon expansion if it erects a theatre structure with the intention of substituting it for an obsolete theatre which it plans to abandon in the same town. The prohibition in its present form is sure to lead to misunderstandings, disputes and possible contempt hearings burdensome alike to the defendants in their day-to-day operations, to the personnel of the Department of Justice, and to the Court below.

The prohibition upon expansion is peculiarly incomprehensible in the light of the plaintiff's charge in its complaint, reiterated during the trial, that the exhibitor-defendants had conspired to divide the territory of the United States. The evidence showed that this charge was unfounded, and there is no Finding or Conclusion tending to sustain the accusation. It is true, however, that the vaudeville houses which were acquired by RKO during its organization period, and which now constitute the bulk of its theatre operations, were principally in the north and east. RKO's early efforts to obtain geographical spread by operating theatres in a number of the larger cities of the south and west were partly successful, but most of these theatres were lost during its reorganization (see Figure 1). Now the Decree restricts, if it does not wholly prevent, RKO's entry into territory where it has no present representation. And this despite the fact that it is reasonable to infer that the result would be the same as the Court

found flowed from RKO's prior exhibition activities: an increase in competition.

Moreover, the absolute prohibition against expansion arbitrarily places RKO as a distributor at the mercy of dominant exhibitor chains in any area where it has no present showcase outlet. It would be a mistake to think of a circuit of theatres only in the sense of a closely controlled business unit operating a number of theatres. Equally powerful as market factors are the voluntary theatre chains which lodge in a single booking agent the authority to license features for all the otherwise independent exhibitors who thus concentrate their buying power. Historically, it was just such a combination of "independent" exhibitors which originally threatened to boycott Paramount product and thus led Paramount to secure its own theatres (Findings of Fact Nos. 5-8, R. 3061-2). The affirmance of the absolute prohibition on expansion thus would be equivalent to a judicial notice to all exhibitors in every state where RKO now is without theatres that they could boycott RKO's product unless it was licensed to them at any terms they might set, with complete confidence that RKO could not protect itself by acquiring its own outlets, save perhaps—and this, as above indicated, not beyond argument—by abandoning a competitive operation elsewhere.

The result is a judicial locking of the whole competitive picture in the industry. This Court is familiar with those risks of industry which arise from external changes which impair the values of fixed investment: for example, shifts of population among the states as well as in local areas; changes in the income characteristics of particular regions, cities and neighborhoods; alterations in public tastes as to location, size or types of theatres and programs; and technological developments which may render

existing theatres inadequate or obsolete. An outstanding example at the present time is the growing preference of many theatre patrons for outdoor drive-in theatres. Active and successful competition calls for flexibility. By the Decree, the District Court would permanently bar RKO from making such adjustments. Such a ban goes beyond the appropriate function of the Courts in an anti-trust proceeding. "It is not for the courts to realign and redirect effective competition where it already exists and needs only to be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion." *United States* v. *National Lead Co., supra,* 332 U. S. at p. 353.

II.

The District Court erred in compelling RKO to terminate its investments amounting to over 5% and less than 95% in certain local theatre holding and operating companies.

The Decree, in Part III, Paragraph 5, directed RKO within two years to terminate certain beneficial interests in theatres (R. 3699).[25] At the time of the trial RKO had

[25] Part III, Paragraph 5 of the Decree enjoins RKO and the other exhibitor-defendants: From continuing to own or acquiring any beneficial interest in any theatre, whether in fee or shares of stock or otherwise, in conjunction with another defendant, and from continuing to own or acquire such an interest in conjunction with an independent (meaning any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in

stock interests falling within this paragraph in companies owning or operating some 289 theatres. In only 20 of these theatres was the interest 49% or more.[25]

The plaintiff introduced no evidence to show the circumstances under which RKO made these investments or their competitive effect. The plaintiff did not charge in the complaint and did not undertake to prove at the trial that RKO acquired any such interest for the purpose of restraining trade, or that the effect of any such acquisition or holding was to restrain or monopolize trade in the competitive area in which the theatre was located.

The undisputed evidence offered by RKO shows that its interests in 254 of the 289 theatres (1) was acquired at the time of its organization or shortly thereafter; (2)

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question), where such interest shall be greater than five per cent unless such interest shall be ninety-five per cent or more. The existing relationships which violate this provision shall be terminated within two years (R. 3699).

[25] RKO's interests in all such companies may be classified as follows:

65% interest in 1 company having 3 theatres
50% interest in 5 companies having 16 theatres
49% interest in 1 company having 1 theatre
35% interest in 1 company having 3 theatres
33-1/3% interest in 3 companies having 24 theatres
30% interest in 1 company having 1 theatre
25% interest in 2 companies having 8 theatres
20% interest in 1 company having 186 theatres
15% interest in 1 company having 1 theatre
10% interest in 2 companies having 96 theatres

Finding of Fact number 117 shows RKO as having joint interests with other exhibitors in 318 theatres (R. 3683). This Finding, however, is predicated on RKO Exhibit 11 which made no distinction between beneficial interests falling within Paragraph (5) and "pooling situations" coming within Paragraph (2) of Part III of the Decree. Government Exhibits 87, 96, 99, 105.

was held solely as an investment; (3) did not give it any advantage in licensing its pictures in the theatres concerned; and (4) did not give it any control over the policy and management of any company or any theatre of any such company. As to the remaining 35 theatres, the record merely shows the extent of the interest of RKO (Gov. Exs. 158, 159, R. 1611-1617).

The Court made no finding that any interest of RKO in any such company was acquired for an unlawful purpose or that in fact such acquisition had restrained trade in any competitive area. The Court did find, however:

> "115. Many theatres, or the corporations owning them, are held jointly by one or more of the exhibitor-defendants, together with another exhibitor-defendant, in some cases in conjunction with independents. These joint interests enable the major defendants to operate theatres collectively, rather than competitively. When a defendant or an independent owns an interest of five per cent or less, such an interest is *de minimis* and only to be treated as inconsequential investment in exhibition.
>
> 116. When theatres are jointly owned by a major defendant and another party, it is evident that both joint owners wish to participate and indeed are directly or indirectly participating in the business of exhibiting motion pictures. The major defendant thereby eliminates putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently."

Insofar as these constitute Findings of Fact, they are unsupported by the Record; insofar as they are Conclusions of Law, we submit they are erroneous.

Without exception, the decisions of this Court have held that an acquisition of a competitor or of an interest in a

competing enterprise is not illegal unless undertaken for the purpose or with the direct and necessary effect of restraining interstate trade and commerce unreasonably.

Standard Oil Company v. *United States*, 221 U. S. 1, 75 (1911);
Appalachian Coals, Inc. v. *United States*, 288 U. S. 344 (1934);
United States v. *The United States Steel Corporation*, 251 U. S. 417 (1920);
United States v. *International Harvester Company*, 274 U. S. 693 (1927);
United States v. *Shoe Machinery Company of New Jersey, et al.*, 247 U. S. 32 (1918).

The applicable law is fully discussed in the brief of the Paramount appellant in Cause No. 81. The required showing of illegality is entirely lacking in the record in this case. In the absence of such a showing, we respectfully submit that the court committed reversible error in ordering a dissolution of these partial interests.

III.

The District Court erred in enjoining RKO from agreeing with a licensee that the latter shall charge a specified minimum admission price during the exhibition of the feature licensed.

The Decree, Part II, Paragraph 1, enjoins the distributor defendants from "granting any license in which minimum prices for admission to a theatre are fixed by the parties * * * in any manner or by any means" (R. 3695). This injunction is based on the Court's conclusion that the

distributor defendants had unreasonably restrained trade by "Agreeing individually with their respective licensees to fix minimum motion picture theatre prices" (Conclusions of Law 8(b), R. 3692). This prohibition is considered in this Brief: first, as applied to a license contract relating to an ordinary feature (Part III of Argument); secondly, as applied to a license contract relating to an unusual feature which is roadshown (Part IV of Argument).

A. A license provision stating the minimum admission to be charged during the exhibition of the feature licensed is normally and reasonably adapted to secure the pecuniary reward of the owner of the motion picture feature licensed, and hence is not illegal per se.

The facts clearly demonstrate that the minimum admission price provision in a film license agreement is normally and reasonably adapted to secure the pecuniary reward of the owner of the feature. This becomes evident when one considers the inherent nature of the motion picture industry.[27] A producer-distributor, owner of a so-called "A" feature, in order to recover his costs and a reasonable profit, must circulate each of his prints to a number of theatres, deriving his profit from the *aggregate* fees. In every area of any substantial size he will serve two or more competing theatres on simultaneous or successive runs. He knows, as a matter of common business sense, that the first-run exhibitor in a given area will have the largest gross receipts, and hence will be able to pay the highest license fee.

The additional value which a print has on its first-run exhibition does not derive from a conspiracy but from

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[27] Record references on the following analysis will be found in the summary of the facts above.

the appeal of the first showing. It is no more subject to legislative, judicial, or administrative control than is the popular preference for any fresh product, whether it be a book, a fashion, or a motion picture. At the time of the first run, the market is untouched. The trade paper, newspaper and magazine stories and the radio commentators' remarks about, and the national and local advertising of, the feature are fresh in the potential patrons' minds. In the smaller cities, such national sources are supplemented by the reviews and advertisements which appear in the large city newspapers reporting on the earlier exhibitions in the metropolitan hub of the particular trade area. So it is that when a feature is first shown in a given competitive area it has its maximum income-producing potential to both the distributor and the exhibitor.

To exploit the inherent values of the feature at the moment of first showing in a competitive area, the distributor normally grants an exclusive license permitting an exhibitor, for a limited time, the right to exhibit the print to the public in a specified theatre. The distributor does not part with his property in the print or in the copyright thereon. He sells neither. He licenses the print for use in a theatre, and both he and the licensee understand that he will license it for later use in competing theatres.

The distributor clearly has two legitimate interests when he makes the license contract. His contractual protection of these two interests is a reasonable restraint which does not violate the Sherman Act.

His first interest is to protect the license fee to be received from the *individual theatre licensed*. The distributor's interest here coincides with the interest of the ex-

hibitor licensed. When the feature is licensed for a specified percentage of the gross receipts of the theatre during its exhibition, the distributor's return depends *directly* upon the admission price charged *during the period of the exhibition of his feature*. As stated by Mr. Wright, of plaintiff's counsel, "Of course, the film rental that any of these theatres can pay is dependent on the length of time that the picture plays, *and the admission price charged by the* theatre" (R. 11). A distributor is not compelled by the Sherman Act, or by any other law, to license his picture without *asking* the exhibitor what price policy the exhibitor *intends* to follow. Such blind (to the distributor) selling would not be required even under the auction bidding technique imposed by the Decree below. The Decree, Section II, paragraph 8(c) authorizes the exhibitor to bid "a flat rental, or a percentage of gross receipts, or both, or any other form of rental, • • •" and directs the distributor, if it accepts any offer, to "grant such license to the highest responsible bidder • • •." If one exhibitor bids $300 flat rental and another bids 35% of gross receipts, a distributor can obey the Decree only if he knows the admission price which the latter bidder intends to charge. By the Decree, he is merely forbidden to translate this representation as to intention into a binding contract that, during the period of the exhibition, the exhibitor will not dissipate the distributor's expected revenue by violating the representation.

Where the license fee is a flat rental, the figure is set upon an estimate of the amount the exhibitor will probably gross on a stated admission price policy. In no other way can the exhibitor intelligently decide what he is willing to pay, or the distributor intelligently decide what he is willing to accept.

The distributor's second interest is in the protection of the *aggregate license fees from the competitive area.* Here the interest of the distributor is *not* coincident with that of any one individual exhibitor but is coincident with the interests of the exhibitors of the area *in the aggregate.* Implicit in the Opinion below appears the view that there is something vicious in the fact that a distributor, faced with the necessity of licensing a limited number of prints in successive runs in competing theatres, keeps the whole playing sequence in mind when he licenses each theatre. It would be unrealistic to argue that a competent distributor does not see the exhibition area as a whole.

In a typical city of 150,000 people, probably 100,000 theatre admissions are sold weekly.[28] The distributor has an interest in seeing that his feature is made available, in competition with features released by his rivals, to these patrons. To afford the maximum variety of facilities, in time, location, and quality of appointments, the distributor subdivides his total market in each area, and licenses numerous theatres. He desires, however, to insert in each license contract a minimum admission provision which in effect constitutes a covenant by the exhibitor not to destroy the value of the rights which the distributor retains.

Such a negative covenant, essential to the protection of the distributor's retained property interest in other licenses, is not an unreasonable restraint of trade. It is a fair and reasonable safeguard for his total revenue from the area. As recognized by Mr. Wright of plaintiff's counsel, an exhibitor "cannot get more, and probably not as

[28] The estimated theatre attendance in 1944 in the United States was 95,000,000 out of a (1940) population of approximately 132,000,000 (RKO Exhibit 2).

much, for a later exhibition of the same area as [another exhibitor] has gotten for the prior exhibition" (Tr. 16).[29] It follows that a change in the admission price policy of an exhibitor "would not only affect the film rental income in" the theatre making the change, "but it would also affect . . . the film rental income in the subsequent theatres, because if the prior-run theatres reduce their admission prices, then the subsequent theatres could not continue to charge the admission prices that they have been charging" (R. 726).

It is interesting to note, also, that in the case of *United States* v. *Schine Chain Theatres Inc.*, now pending on appeal in this Court, the government's counsel stated in the trial court:

> "Whatever may have been the position originally, this method of licensing films through clearance and minimum admission prices has been established in the industry and it is the way in which the industry operates and so long as those restraints are reasonable, as far as we are concerned there clearly is no conflict with the Sherman Act" (Schine Record, p. 494).

No one urges that for this reason there should not be full flexibility of prices at the exhibitor level. What is argued, however, is that there is no violation of law when an exhibitor contracts to charge a certain minimum during the exhibition of a particular feature. The distributor, to

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[29] Mr. Wright was referring to Warner as the prior run exhibitor, but his remark evidences his understanding of the fundamental business reality which has no relation to whether either the prior-run or subsequent-run exhibitor is affiliated.

protect his interest in the revenue from the license under negotiation, and from the several runs in the area, does, of course, have "in contemplation" the several exhibitors who in a given area are going to exhibit his picture (Opinion, p. 27).

But it is a far, indeed an impossible, step from the fact that the distributor has in contemplation the several exhibitors who will license his picture, to the conclusion that each individual license agreement is a price fixing combination which violates the Sherman Act. The distributor is not selling a commodity which bears his trade-mark or name. If he were, he could, under the Fair Trade Acts of forty-five states, prevent such destruction of the value of his property. Selling nothing, but granting merely a license, he is to be barred from the protection afforded by a reasonable covenant which has merely the effect of preserving his retained property right: the revenue in future licenses.

The decisions of this Court do not support the conclusions of the trial court. This Court has upheld a provision in a patent license agreement which allowed the licensee to make and vend a patented product and specified the retail price. *United States* v. *General Electric Company*, 272 U. S. 476 (1926). The *General Electric* case, though vigorously attacked from time to time, has not been overruled or limited by this Court.[30] Rather, it has been cited with approval. In *Carbice Corp.* v. *American Patents Develop-*

[30] The Court was requested to overrule the *General Electric* case in *U. S.* v. *Univis Lens Co.*, 316 U. S. 241, and *U. S.* v. *Masonite Corp.*, 316 U. S. 265, but did not do so. It is now being requested to overrule the case in the appeal in *United States* v. *Line Material Co.*, reported below at 64 F. Supp. 970 (1946).

ment Corp., 283 U. S. 27 (1931), this Court recognized that a patent owner "can grant licenses upon terms consistent with the limited scope of the patent monopoly," citing with approval the *General Electric* case. In *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175 (1938), the court cited the *General Electric* case with approval as establishing that the patentee may grant a license upon any condition the performance of which is reasonably related to the reward which the patentee by the grant of the patent is entitled to secure. In *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436 (1940), the court again cited the *General Electric* case with approval. See also, *Bement* v. *National Harrow Company*, 186 U. S. 70 (1902).

Each feature motion picture is copyrighted. The owner of a copyrighted feature has, under the copyright law, "the exclusive right . . . [to] perform or represent the copyrighted work publicly if it be a drama . . . and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever" (17 U. S. C., §1). A copyrighted motion picture is a "drama" within this provision and its exhibition by projection on a screen constitutes a performance of the drama. *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55 (1911); *Patterson* v. *Century Productions*, 93 F. (2d) 489 (C. C. A. 2d 1937). The Sherman Act does not abridge rights conferred by Copyright Law. Hence a contractual provision which constitutes merely the exercise of the statutory monopoly does not fall within the condemnation of the Sherman Act. Cf. *Virtue* v. *Creamery Package Mfg. Co.*, 227 U. S. 8, 32 (1913).

The position of the distributor is clearly different from that of the publisher who sells outright a copyrighted book for a satisfactory price. In *Bobbs-Merrill* v. *Straus*, 210

U. S. 339 (1907) it was held that after such a sale the publisher, having parted with all title, dominion, and control, could not fix the resale price of the book. That case has no significance on the issue here, where the license passes no title whatsoever and only a limited privilege of exhibition.

Moreover, factually the motion picture copyright owner may reasonably assert an even stronger right to protect his interest than can the owner of the usual patent. Only a limited number of exhibitions of the unique copyrighted feature are practical in each area. No sale of any product is involved. Instead a mere license to exhibit a motion picture is granted. The distributor reserves the right to issue other licenses. Even if the feature were not copyrighted, the property in the film is unique and the facts above clearly demonstrate that the owner of the feature has a legitimate interest in the admission price to be charged by the licensee.

B. The minimum price provision is not invalidated by the fact that the feature licensed is usually not the sole item on the theatre program.

The attack upon minimum admission provisions has yet another string to its bow. It is observed that usually the feature licensed is but one part of the theatre's program. From this fact it is argued (even assuming *arguendo* validity were the feature the sole item on the program) that a license stipulation as to the admission price must be illegal. An effort to secure aid and comfort for this argument is sometimes made by citation of the dictum in *Interstate Circuit* v. *United States*, 306 U. S. 208, at 228 (1939) wherein Mr. Justice Stone said: "Because a patentee has

power to control the price at which his licensee may sell the patented article, it does not follow * * * that the owner of a copyright can dictate * * * the admission price which shall be paid for an entertainment which includes features other than the particular picture licensed." The issue was not posed or litigated in the *Interstate* case, and the language quoted was a mere passing disclaimer of any intention to prejudge the question when it should be presented directly.

It is now presented directly to this Court for the first time, and the superficially attractive argument which is launched from the shaky foundation of a passing aside must be tested against the realities disclosed by a record in which the issue has been directly litigated. The fact is that the minimum price provision applies solely to the exhibition of the feature licensed. That feature constitutes the backbone of the entertainment.

The distributor has no control over the manner in which the exhibitor plans a program of entertainment. The exhibitor is licensed to exhibit the feature. Whether the feature is to be presented alone, or as a part of an elaborate program including short subjects, other features, or even stage shows, is within the unrestricted discretion of the exhibitor. As a good salesman, he may elect to package the feature in the way he considers most appealing to the public. The distributor has only the right to specify the minimum admission price at which the particular feature owned by the distributor is to be exhibited. How this right can be lost because the exhibitor elects to license other films and exhibit them on the same bill defies legal analysis. After all, the provision is for *minimum* admis-

sion prices, and the exhibitor is free to charge any higher amount that he may believe justified by the quality of the additional entertainment offered.

IV.

The District Court erred in enjoining RKO from agreeing with a licensee that the latter shall charge a specified minimum admission price during the exhibition of an unusual feature roadshown in advance of general release.

Part III of the Argument deals with the minimum admission price stipulation in the license of an ordinary feature. Part IV deals with those unusual features which are roadshown at advanced admission prices prior to general release.

In the Consent Decree special treatment was accorded the roadshow situation by Section XIV, reading as follows:

> "Nothing contained in this decree shall be construed to limit or affect the right of any distributor defendant, prior to the general release of a motion picture, to road show such picture or to license or otherwise arrange for the road showing of such picture upon such terms and conditions as may be fixed by the distributor." [Note: Roadshow was defined as "an exhibition at a theatre where a majority of the main floor seats for each evening performance are reserved and sold at an admission price of not less than one dollar."] (R. 3391)

After the Opinion in this cause, the major defendants proposed a form of decree which, in Section V, would have authorized distributors to lease or otherwise to contract

for the temporary use of a theatre for the road showing of a particular feature (R. 3261). This would have continued the provision contained in Section XIV of the Consent Decree.

At the time of the hearing on this proposal, the defendants offered to limit its scope to features having a production cost of $3,000,000 or more (R. 3074). The Court failed to include in the Decree any provision which would permit the continuance of the practice under any circumstances. Furthermore, by its absolute prohibition upon expansion, the Court cast doubt upon the propriety of a distributor's leasing for temporary periods a theatre to be used for roadshowing its own productions.

The problem was forcefully presented at the argument below upon the form of the decree. Vanguard Films, an independent non-defendant producer, presented an application to file a brief *amicus curiae* (R. 2584). Vanguard was not controlled, directly or indirectly, by any defendant, but it released through United Artists (R. 2586). For more than a year before the Opinion below, Vanguard had in production a very costly feature, and at the time of the argument on the decree it had invested therein some $6,500,000 (R. 2855). Vanguard "planned to do something that was traditional in the industry": to roadshow the feature (R. 2855). The reason which Vanguard gave was simple: "We want to get our money back." This was the same reason for the roadshowing of other unusual pictures (R. 721).

The reaction of plaintiff's counsel to the Vanguard plea was somewhat amorphous. He was "opposed to any road show exemption" (R. 2876). But he observed that "insofar as these independents may release their film through

non-defendant distributors, they are not subject to any of the Decree's restrictions" (*ibid.*). And "as far as the particular picture *'Duel in the Sun'*, which apparently gives rise to that petition, is concerned, we believe that the provisions of the Decree ought not to be made to apply to that picture * * *" (R. 2876-77). And in any event, "United Artists, which is to release the picture, * * * proposes to appeal from the price-fixing provisions of the decree * * * and we assume that a stay of such provisions during such appeal would probably take care of whatever special hardship might be presented by that picture * * *" (R. 2877).

If any thread of consistency can be found in these expressions, it is that plaintiff's counsel fully realized that roadshow licenses were not *per se* violative of the Sherman Act, but that in his zeal to penalize these defendants, he was unwilling to yield even one concession. Can it be seriously argued that six roadshown features in five years by the eight outstanding distributors evidence a conspiracy? The inference is clear: plaintiff's counsel fully realized that such license provisions are lawful.

During the five year period, a total of six features were roadshown: three by Paramount, two by Fox, and one by Loews. None of the other five defendants roadshowed a feature. There is no evidence in this case which would support a finding that fixing a minimum admission price in a roadshow license for an occasional feature picture has any effect whatsoever upon competition in the licensing of motion pictures, either among the same or other exhibitors for other contracts, or among distributors. It is apparent, also, that such a provision, employed only exceptionally, in roadshow licenses, can have no substantial effect on the

general pattern of admission price competition among exhibitors for the patronage of movie-goers. The commerce involved in that competition is wholly intrastate. *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947); *Federal Club* v. *National League*, 259 U. S. 200 (1922).

The inevitable effect of the prohibition will be to obstruct, if not wholly to end, the production of outstanding features of the type which have been roadshown in the past. Many of these have been considered landmarks in the industry. The prohibition clearly runs counter to the admonition of this Court that the Decree should not place the defendants under a restriction "which may do more harm than good." *Sugar Institute* v. *United States*, 297 U. S. 553, 605 (1936).

The argument in Part III, though directed to ordinary features, is equally applicable to the roadshow exhibition license, with the added weight that frequently a roadshown picture is the only item on the program during its run.

Unless a roadshow license contract stipulating a minimum price is illegal *per se*, the Decree below which by its broad provisions proscribes such licenses cannot stand. This is true because the very nature of the roadshow distribution makes it impossible for it to be used as an instrumentality in a nationwide conspiracy of the type charged against these defendants. Even if the District Court's inference of conspiracy concerning the distribution of ordinary feat res were justified on the Record, there would be no basis for an inference that such conspiracies exist or are threatened with respect to the occa-

sional licensing of features for roadshow exhibitions. In the first place, there is no evidence from which any inference can be drawn that in licensing roadshow exhibitions two or more distributors stipulate the same admission prices in their separate contracts. In the second place, roadshow exhibitions do not take place in all theatres in any given area. It can hardly be said that the licensing of six features on this basis in the past five years or more has created a "national system to fix prices" which "regulates the licensees' ability to compete against one another in admission prices" (see Opinion of Court p. 25, R. 3527) or that the erection of such a system is threatened in the future by the occasional licensing of roadshows.

No public purpose will be served by outlawing roadshows entirely. On the contrary, the public may well be deprived of extraordinary pictures for which in the past it has willingly paid a higher than usual admission price.

V.

The District Court erred in concluding that it lacked power to continue the arbitration system established in the Consent Decree pursuant to the prayer of Plaintiff's Amended and Supplemental Complaint.

This point is briefed by the appellant Fox. To avoid repetition the Fox brief is adopted insofar as it deals with the power and propriety of the Court's continuing the existing arbitration system.

Conclusion as appellant

It is respectfully submitted that the judgment of the District Court in the respects herein complained of should be reversed.

Dated: January 15, 1948.

ARGUMENT FOR RKO APPELLEES IN CAUSE NO. 79

The Brief for the United States as appellant (here cited as Pl. Br.) concentrates on the five defendants engaged in the production, distribution and exhibition of features. The plaintiff describes its "attack on the action below" as being "confined largely to the adequacy of the relief granted" (Pl. Br. 11). It disclaims any intention to "challenge any of what [it] considered to be the evidentiary findings," but it does "object to the court's failure to conclude that the defendants, both individually and collectively, had monopolized important segments of the motion picture industry" (*ibid*). It asks this Court to rewrite the Decree so that each integrated defendant shall be split into two companies, one to produce and distribute feature pictures,[1] and the other to operate theatres.

The contention that the refusal of the District Court to order RKO to divest itself of all interests in any theatre necessarily rests on the basic contentions that:

(1) The District Court erred in refusing to find that RKO through the use of its theatres is engaged with the other four theatre-operating defendants in a nationwide conspiracy to monopolize the distribution or exhibition of motion pictures, and hence to conclude that the separate theatre operations of all defendants may be treated as an aggregate (discussed in Point VI); or

(2) The District Court erred in refusing to find and conclude that RKO as an integrated company producing,

[1] Plaintiff recongnizes that a company engaged in production and distribution is "integrated" (Pl. Br. 6).

distributing, and exhibiting feature pictures is an unlawful combination (discussed in Point VII).

In addition to convincing this Court that it is correct on either point (1) or (2), plaintiff, to secure a reversal of the Decree, must also establish:

(3) That the District Court erred in rendering the Decree appealed from, because the same is so inadequate as to constitute an abuse of discretion (discussed in Point VIII).

All of the plaintiff's arguments fall within these three propositions, and will be so discussed.

VI.

The District Court correctly refused to find that RKO through the use of its theatres is engaged with the other theatre-operating defendants in a nation wide conspiracy to monopolize the distribution or exhibition of motion pictures, and to find that its theatre operations may be aggregated with those of the other defendants for the purpose of establishing general claims of monopoly in exhibition.

The District Court found that the defendants had conspired to establish a nationwide system of clearance, run and minimum admission prices. It was the Court's view that this conspiracy in general operated for the benefit of prior-run theatres, whether affiliated or unaffiliated. We have demonstrated that this illegality, if any existed, has been completely corrected by the injunctive provisions discussed in Point I A, at page 39, *supra*.

The illegalities found arose not from the fact that certain defendants owned theatres, but from the fact that all the distributors—those with no theatres as well as those with theatres—followed certain distribution practices which the Court considered illegal and which "if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five exhibitor defendants * * * have owned or controlled * * * theatres * * *" (Finding of Fact No. 154, R. 3690).

The District Court concluded, moreover, that "the five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition" (R. 3553). The Court also found:

> "The present theatre holdings of the five defendant-exhibitors Paramount, Loew's, Fox, RKO and Warner, aggregate little more than one-sixth of all the theatres in the United States, and by such theatre holdings alone the defendants do not and cannot collectively or individually, have a monopoly of exhibition" (Finding of Fact No. 119, R. 3684).
>
> "There is no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly either in production, distribution or exhibition * * *" (Finding of Fact No. 152, R. 3689-90).[2]
>
> "In localities where there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of the competitors, their lack of finan-

[2] The court added "except as found in Findings 153 and 154 below" (*ibid.*). This limitation is meaningless, since there is no contrary Finding in either 153 or 154.

cial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from 'inherent vice' on the part of these defendants" (Findings of Fact No. 153, R. 3690).

Hence, plaintiff's argument, in so far as it attempts to draw inferences from aggregate figures, is built upon a premise which the District Court expressly repudiated. The plaintiff's brief nowhere undertakes to set forth any factual or legal justification for thus lumping together RKO and the other companies and ignoring their numerous differences in origin, development, size and operating policy.

The District Court's refusal to treat the theatre holdings of the defendants as a composite aggregate is supported by the evidence and wholly consistent with its Findings of Fact. To prevail, therefore, the plaintiff must convince this Court that it should overturn the District Court's Findings. "Findings of Fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" (Fed. R. Civ. Proc. 52(a)).[3]

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[3] In this case plaintiff offered over 400 exhibits, called no witnesses, and rested. The defendants introduced witnesses whose testimony is recorded in some 1800 pages of the Record and was supported by numerous exhibits. The judges considered this Record for over a year before making their Findings of Fact. As Judge Hand said in *United States* v. *Aluminum Co.*, 148 F. (2d) 416 (C. C. A. 2d, 1945) at p. 433:

> "Rule 52(a) in substance merely carried over the earlier practice in equity to all trials before a judge. State Farm Mutual Automobile Insurance Co. v. Bonacci, 8 Cir., 111 F. 2d 412, 415; Petterson Lighterage & Towing Corporation v. New York Central R. Co., 2 Cir., 126 F. 2d. 992, 995; Katz

In an effort to discharge this burden, the Government employs composite figures throughout its argument, and urges that these figures disclose a combination and conspiracy by the integrated defendants through the use of

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Underwear Co. v. United States, 3 Cir., 127 F. 2d 965, 966; 3 Moore's Federal Practice, §52.01 * * * [A]n appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded * * * His duty is to sift the evidence, to put it into logical sequence and to make the proper inferences from it; and in the case of a [large] record * * * it is physically impossible for an appellate court to function at all without ascribing some prima facie validity to his conclusions. Consumers Import Co. v. Kawasaki, 2 Cir., 133 F. 2d 781, 787. What the plaintiff is really asking is that we shall in effect reconsider the whole evidence de novo, as though it had come before us in the first instance. The impossibility of that at once appears * * * However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must be treated as unassailable,' Davis v. Schwartz, 155 U. S. 631, 636; 15 S. Ct. 237, 39 L. Ed. 289; Adamson v. Gilliland, 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356; Alabama Power Co. v. Ickes, 302 U. S. 464, 477, 58 S. Ct. 300, 82 L. Ed. 374. The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds. Morris Plan Industrial Bank v. Henderson, 2 Cir., 131 F. 2d 975, 977. Since an appellate court must have some affirmative reason to reverse anything done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases."

their theatres to create a nationwide monopoly of the distribution and exhibition of motion pictures. The District Court repudiated this contention. We shall examine these aggregate figures in the light of the activities of RKO. Such an examination will demonstrate, as the Court below found, that the theatres of RKO have been in active and vigorous competition with both affiliated and independent theatres, and that the composite figures form no sound basis for the inferences which the plaintiff asks this Court to substitute for those of the District Court.

1. Plaintiff urges that "together" the defendants distribute a large number of features (Pl. Br. 21, repeated 54). The defendants distribute no features "together." In 1943-1944 the eleven national distributors, of which eight are defendants, separately released a total of 397 features, including 137 features released by the three non-defendant distributors (Finding of Fact No. 99, R. 3677).[4] Separately each of the eight distributor-defendants released from 4.04 to 12.34 per cent. of the 397 features distributed by the eleven national distributors. RKO distributed 9.57%, of which a substantial number were handled for independent producers. There is no more basis for lumping RKO's percentage with that of United Artists (which distributes only), or Columbia (which produces and distributes), or Warner (which produces, distributes and exhibits), than there is for lumping RKO's theatres with those of any other circuit, independent or affiliated.

[4] The Finding refers to 62 of the features distributed by non-defendants as "Westerns." The attempted distinction between so-called "Westerns" and other features is of no real significance, since most, if not all, of the producers release a substantial number of low cost productions (Pl. Exs. 40, 56, 80, 93, 125, 136, 143).

2. The Government next urges that one or the other of the defendants has some interest in a total of 3,137 theatres (Pl. Br. 19, repeated 54). The District Court's choice of language in its Finding of Fact No. 118 (R. 3684) is precise. It states that of the 3,137 theatres, RKO owned "*independently of the other defendants*" 109 theatres, or 0.6% of the total. In 82.65% of the theatres in the United States *no* defendant had *any* interest. Plaintiff tacitly concedes (Pl. Br. 17), and on the trial openly conceded (R. 1600), that there has been no expansion of RKO's theatre holdings since 1935, although in the same period the total number of theatres increased by nearly 5,000 (Finding of Fact No. 145, R. 3688). Indeed, the number of theatres which RKO operates is now substantially less than in the past (See Figure 1, p. 11). The mere fact that other defendants own numerous theatres is no basis for adding all the separate interests into a single figure.

3. Plaintiff refers to the 92 cities having populations of over 100,000 and asserts that "the five major defendants together own interests in at least 70 per cent. of all the first-run theatres" in such cities (Pl. Br. 20, repeated 55). The word "together" thus again suggests joint operations. The fact is that RKO operates 9.2% of the first-run theatres in these cities. In 67 of the cities RKO operates no first-run theatre. In the remaining 25 cities there are 175 first-run theatres, of which RKO operates 47. In all except one it is actively competing with first-run theatres in which it has no interest;[5] and in all is competing

[5] The exception is Grand Rapids, Michigan, where RKO operates two first-run theatres and has a 10% minority interest in the theatre operating company which operates the other three first-run theatres.

with theatres operating on other runs (Appendix A; Finding of Fact No. 147, R. 3688).

When plaintiff turns (Pl. Br. 21, repeated 55) to cities of 25,000 to 100,000 population, the complete lack of any pattern to which RKO conforms again appears. RKO operates thirteen (or 1.5%) of the 978 first-run theatres in cities of this bracket,[6] and all of them have first-run competition (Appendix A). In the thousands of urban centers below 25,000, RKO has only 5 theatres—a number so small as to be described by Mr. Wright, plaintiff's counsel, as inconsequential (R. 371).

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[6] Both confusion and incompleteness mark plaintiff's factual discussion of these cities. It says (Pl. Br. 21) that there were 978 first-run theatres in these 320 cities, *of which 401 first-run theatres (or 41%) were independent*, i.e., theatres in which no defendant has any interest. It says that in 135 of the 320 cities affiliated theatres played all the product of the eight distributors on first-run (Pl. Br. 21). Plaintiff omits the fact, proved at the trial, that *in 93 of the 320 cities independent theatres played all the product of the defendants on first-run; that in the remaining 92 cities independent theatres played a part of the product of the defendants; and that plaintiff's own witness admitted that "no independent theatre in these 313 [320] towns went without films"* (R. 2390). Plaintiff says (Pl. Br. 21) in the next sentence that "in at least 300 *additional* towns [i.e., additional to the 135 where affiliated theatres played all products], most of them with populations under 25,000, an operator affiliated with one of the major defendants had all of the theatres in the town." This statement is in part false, in part meaningless. It implies that some of the "additional" towns were over 25,000, yet plaintiff's own witness shows that in all the cities of 25,000 to 100,000 other than the 135 some independent theatre played product, hence must have existed. As to towns under 25,000, the plaintiff has stipulated that *in approximately 6200 towns between 2,500 and 25,000, no defendant has any interest in any theatres* (R. 358, 365). Hence it is utterly meaningless to say without more that in some 300 towns some unidentified defendant or defendants have all the theatres. Are these one- or two-theatre villages, or are they cities of significant size? Plaintiff omits to say.

4. Plaintiff also urges that the "defendants' theatres are so located that there is practically no competition between them" (Pl. Br. 55, figures repeated from 16 to 21). It asserts that there are at present only 47 towns of the 922 in which the defendants own some theatre interests in which "the theatre interests of two or more majors are operating in nominal competition with each other" (Pl. Br. 55-56). Is this generalization true as to the theatres of RKO?[7] RKO operates first-run theatres in 39 cities and towns, and in over 30 of these is competing with theatres operated by other defendants and in all of them is competing with theatres operated by other defendants or independents or both (Appendix A).

Plaintiff would have this Court conclude that this competition is nominal rather than real, but plaintiff—which says it attacks no Findings—is confronted with the fact that the District Court specifically found that there was competition on first-runs

> "In about 91 per cent. of the 92 cities with over 100,000-population * * * between independent theatres and theatres of one or more of the defendants, or among the defendants themselves, except so far as it may be restricted by the trade practices found to have unreasonably restrained competition. In the remainder of the 92 cities there is always competition in some run" (Findings of Fact No. 147, R. 3688).

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[7] At Pl. Br. 15 it is erroneously stated that the defendants "operate" theatres in 922 cities. As shown at Pl. Br. 16 and 55, the 922 towns and cities are those in which a defendant has some interest in a theatre. The undisputed evidence establishes that in many of these towns such interests are small minority investments and that the interested defendant does not operate or control the operation of the theatre or theatres involved. As to RKO, see R. 1611-1617.

This Finding is fatal to plaintiff's theory that RKO has participated in conduct which justifies its aggregation with other defendants to establish charges of general monopolization.

Lack of precision is found in the conversion of the statement (Pl. Br. 16) that in 100 towns "two or more defendants pool * * * *all or some* of their theatre interests," into the statement (Pl. Br. 55) that in such towns "two or more defendants have pooled their theatre interests." At any rate, the Decree required all "pools" to be terminated before July 1, 1947, RKO has done so, and no contempt proceeding has been brought against any other defendant. This past conduct, if improper, has thus been fully remedied by the Decree.

5. Plaintiff urges (Pl. Br. 18) that there has been no competition between defendants' theatres for product, and claims as evidence thereof a failure to show large shifts in customers in the years prior to the trial. Not a single exhibitor, and not one of the officers or agents of the fifty or more buying combines which dominate the licensing of films for many so-called independent theatres (R. 738), was called by plaintiff to testify that he had ever sought to license features from RKO and been refused, either arbitrarily or for good reason. It is not inapposite to recall that in *Interstate Circuit* v. *United States,* 306 U. S. 208 (1939) the United States made much of the failure to produce witnesses other than those who testified, and that this Court observed (p. 226): "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."

Reckless shifting of exhibitor outlets is not a necessary or desirable aspect of a fully competitive society. Manufacturers and distributors of all commodities which are sold through a limited number of local outlets tend to retail through the same agency, store, or firm from year to year. A high turnover of outlets, like a high turnover of labor, is a sign of unnecessary friction in the economic mechanism. Such fluctuation of outlets is not in the interest of the manufacturers, the retailers, or the public. A motion picture distributor or an exhibitor which attempted weekly, monthly, or annually to shift its product completely would soon be in bankruptcy.

But if one of RKO's regular customers becomes unsatisfactory, either because he is not willing to pay the license fees RKO thinks its product justifies, or because he does not faithfully perform his contracts, or for any other business reason, RKO seeks a new outlet (R. 1703-04). For example, in Buffalo, Salt Lake City, and Oklahoma City it shifted from affiliated theatres with which it was dissatisfied to independent exhibitors who could offer it better outlets (R. 1700, 1705). These are typical of the frequent occasions when RKO has left affiliated for independent exhibitors (R. 1703-04). While the evidence did not emphasize shifts from independent to affiliated theatres, no doubt for similar business reasons such shifts have on occasion been made.

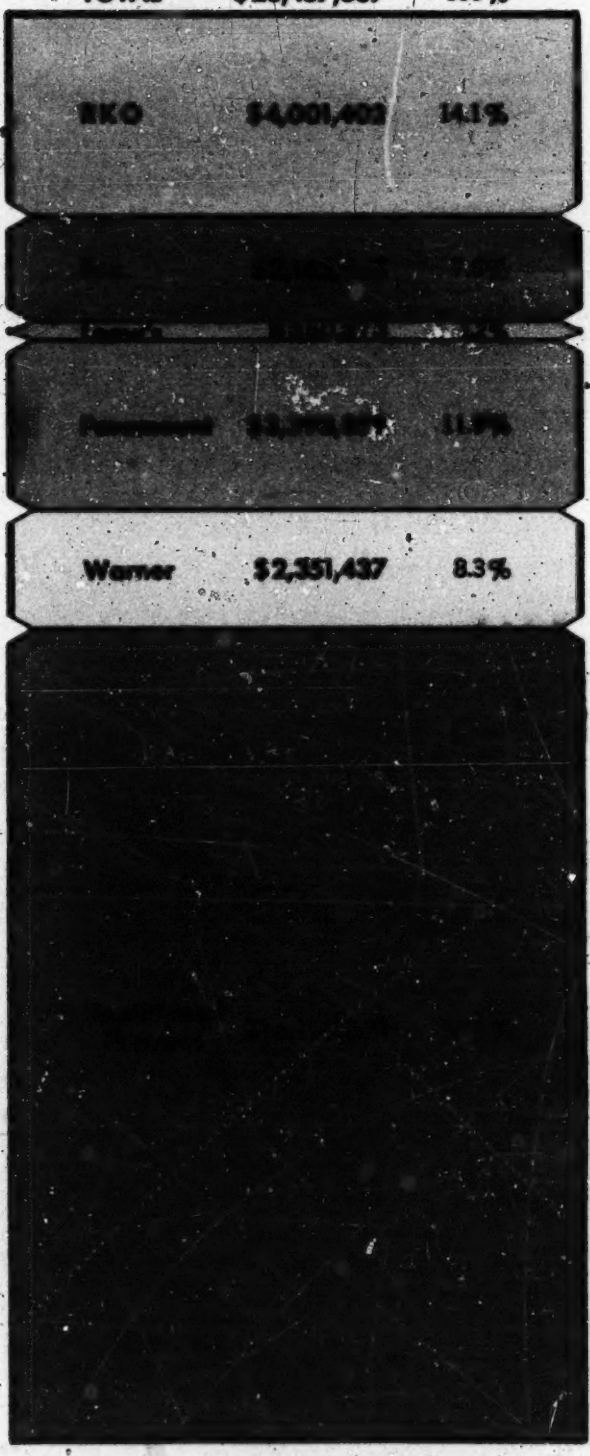
6. Plaintiff argues that the "conspiracy to fix runs" was an exclusionary conspiracy (Pl. Br. 56). By this plaintiff apparently contends that the defendants conspired (a) to exclude independent theatres from access to features distributed by the defendant, and (b) to exclude in-

dependent producers from access to affiliated theatres. The undisputed evidence shows that RKO does not fit any pattern of exclusion on either theory.[8]

(a) RKO as a distributor relies heavily upon the independent theatres for the exhibition of its features. Of each dollar of domestic rental received by RKO in 1943-44, 57¢ came from independent theatres, 14¢ came from theatres affiliated with RKO. Only 29¢ was paid RKO by the theatres affiliated with the other defendants (RKO Ex. 7, reproduced).

[8] Indeed, in its opinion, the District Court specifically stated:

"The foregoing is not to be construed, however, as indicating that the distributor-defendants have discriminated among their licensees with respect to film rentals, clearances, or minimum admission prices. They have perhaps done so, but we are without sufficient knowledge of the many factors entering into the determination of these provisions such as the character of theatre appointments, of the patrons, operating policies, locations, and responsibilities of operators. In the absence of such facts, we are unable to infer that the distributor-defendants have violated the Sherman Act in this particular regard * * *" (R. 3551)



Source: RKO's Answer to the Government's Interrogatories 2 and 3, 1945.

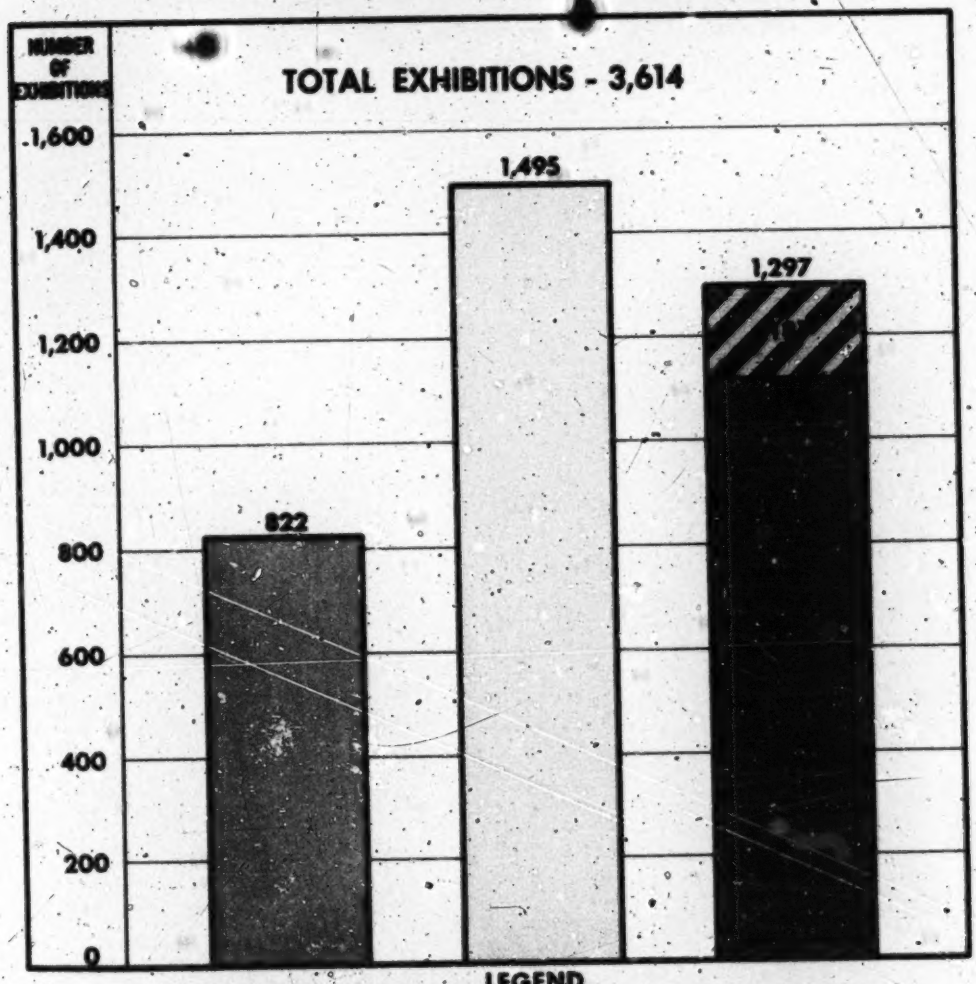
RKO relies heavily on the independent theatres for its first runs. This is true both as to the large and the smaller cities, and, of course, is undisputed as to the small towns.

In the 92 large cities with a population of 100,000 or more, the 38 features RKO distributed during 1943-44 played 3,614 first-run engagements, of which 1,097 were in theatres in which RKO had some interest[9] and 1,116 were in theatres in which no defendant had any interest (RKO Ex. 12, reproduced).

[9] RKO Exhibits 14, 17 and 19 used plaintiff's test of affiliation to include all theatres in which any defendant had *any* interest, however indirect or however small.

RKO Ex. 12
In Evidence
Witness - Miller

FIRST RUN
EXHIBITION OF FEATURES DISTRIBUTED BY RKO RADIO PICTURES, INC., DURING 1943-'44 SEASON IN CITIES OVER 100,000 POPULATION



Source: RKO's Admission of Facts (1945)

In these 92 cities were 511 theatres which plaintiff treated as first-run. RKO had some interest in 71, although it operated only 47. Plaintiff treated as affiliated with other defendants approximately 291, and as independent approximately 149. The following table shows RKO's choice of first-run customers:

	Number of First-Run Theatres	Per cent. of Total First-Run Theatres	Per cent. RKO First-Run exhibitions	Difference
Treated as affiliated with RKO	71	13%[10]	27.8%	Plus 14.8%
Other theatres treated as affiliated	291	58%	41.2%	Minus 16.8%
Aggregate		71%	69.0%	Minus 2.0%
Theatres treated as unaffiliated	149	29%	31.0%	Plus 2.0%
Totals	511	100%	100.0%	

Plaintiff conceded that RKO properly could prefer theatres affiliated with it (R. 1945). Excluding such first-run theatres, this table shows that other affiliated theatres, constituting 58% of the total, received only 41.2% of the first-run licenses of RKO's pictures, while unaffiliated theatres, constituting 29% of the total, received 31% of such licenses. This is not a picture of discrimination.

But was the 41% of RKO's product which *did* go to affiliated theatres contracted to them because of discrim-

[10] In the 92 cities RKO *operated* only 47 first-run theatres, under 9% of the total (RKO Ex. 1).

ination in their favor? The evidence answers: No. In these 92 cities RKO licensed its product as follows:

To its own theatres	24 cities
(Where the RKO theatres lacked sufficient playing time fully to utilize RKO's product, the surplus—amounting to 107 exhibitions in the 24 cities—was licensed 56 to affiliated theatres and 51 to independent theatres.)	
To theatres operated independently but in which RKO had a minority interest	3 cities
To independent theatres	24 cities
Roughly one-half to independent theatres and one-half to affiliated theatres[11]	6 cities
(The average was 20 to affiliated, 18 to independent theatres.)	
To affiliated theatres in	35 cities
Total	92 cities

[11] Though RKO licensed a substantial part of its product to unaffiliated theatres in these six cities, the evidence is undisputed that the affiliated theatres were at least as good as, if not better than, the independent first-runs; Akron, R. 450; Birmingham, R. 844-45, Par. Ex. 25, pp. 1-4; Cambridge, R. 852-3; Houston, R. 465, 865; Kansas City, R. 2068-9, cf. R. 757; Pittsburgh, R. 484-5, 760, 763, 1141.

The great majority of the 41% licensed to affiliated theatres obviously was in the 35 cities of the last category. Detail as to these 35 cities is given in Appendix D, with full record references. The record shows the seating capacities of the first-run theatres in 28 of these cities. In 23 of the 28 cities the affiliated theatre playing the high grossing features in RKO's first block, which of course are the ones on which dispute would center, exceeded the seating capacity of the largest competing unaffiliated theatre by at least 22.6%. In most of the cities the seating capacity difference was even greater, in many being at least 75% and in some as much as 175 to 190%. Seating capacity, while not determinative, is an important factor in the selection of a first-run outlet, since it has a direct bearing on revenue potentialities (R. 1697, 1902). The record establishes that business factors were dominant in the selection of the first-run theatres in the other seven cities.

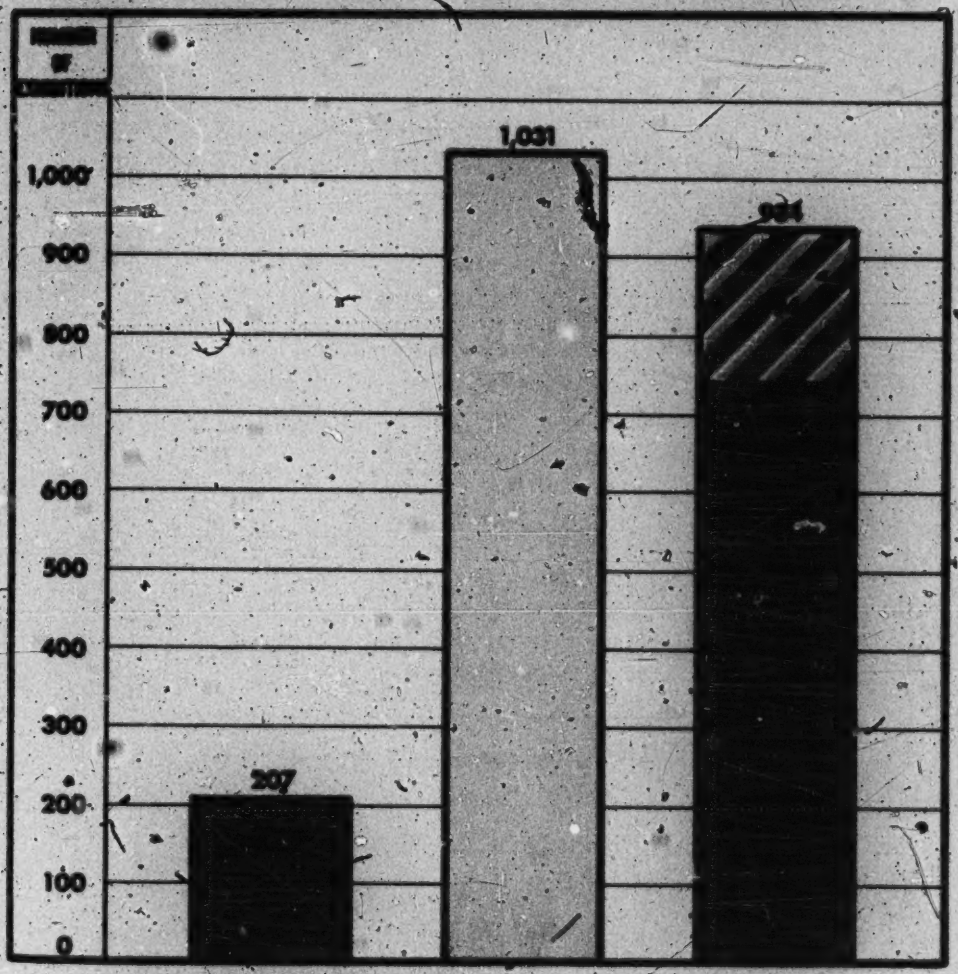
In the 412 cities of 25,000 or more population, the record is equally clear. The aggregate number of first-run exhibitions of RKO's first 1943-44 block, and the division between affiliated and independent theatres, is shown by RKO Ex. 15, reproduced on page 93.

As to the 320 cities of 25,000 to 100,000 population, Plaintiff's Appendix (pp. 308-317) shows 92 cities in which plaintiff concedes there is first-run competition between affiliated and independent theatres: in 48 of these 92 cities all or some of RKO's features were shown in the independent theatres, although such theatres numbered only 133 of a total of 336 theatres in such cities.

From RKO Ex. 15
In Evidence
Witness-Miller

RKO: U. S. v. PARAMOUNT PICTURES, INC., ET AL.

Distribution of first run exhibitions of RKO's 1943-1944 first block features between affiliated and unaffiliated theatres in cities over 25,000 population



LEGEND

Exhibitions in theatres in which RKO has an interest of 50% or more, and in theatres controlled by RKO in which RKO and another defendant have an aggregate interest of 50% or more.

Exhibitions in theatres in which one or more of the defendants (other than RKO) have an interest of 50% or more.

Exhibitions in theatres in which one or more of the defendants have interests of less than 50%.

Exhibitions in theatres in which no defendant has any interest.

Source: RKO's Admission of Facts (1945)

More precise analysis of the basic data from which plaintiff made its appendix table shows that these exhibitions occurred:

In theatres operated by RKO	11 cities
In theatres independently controlled and operated, but in which RKO had a minority interest	14 cities
In independent theatres	107 cities
In part in independent theatres and in part in affiliated theatres	35 cities
In theatres in which another defendant had minority interest	20 cities
In affiliated theatres in cities where there were no independent theatres	19 cities
In affiliated theatres which were larger than the largest unaffiliated theatre	58 cities
Two highest grossing pictures shown in affiliated theatres larger than any unaffiliated theatre, three less desirable features shown in smaller affiliated theatre	43 cities
	307 cities

There were thus only 12 cities out of 319 where the RKO first block showed first-run in an affiliated theatre smaller than the largest independent theatre. In six of these the

undisputed evidence showed the superiority of the affiliated theatres, and as to the other six there was no evidence.[12]

These tabulations reveal the high percentage of RKO's first-run exhibitions in independent theatres in the 412 cities of 25,000 or more. The soundness of RKO's business judgment in selecting these theatres is shown by the fact that its first-run affiliated outlets in the 412 cities paid it on an average of 16.6% more per theatre than the independents (RKO Ex. 16). This was not due, as has sometimes been charged, to a policy of licensing the best pictures to affiliated and the less successful ones to independent theatres. Excluding first-runs in RKO's theatres, there were, in these 412 cities 1,965 first-run exhibitions of the first block of RKO's product in 1943-44. 52.47% were in theatres in which some defendant, other than RKO, had an interest of 50% or more; 9.86% were in theatres in which such a defendant had an interest of less than 50%; and 37.66% were in theatres in which no defendant had any interest (See RKO Exhibit 15, reproduced opposite p. 92). Appendix G, page 193 of this Brief, based on RKO Exhibits 13 and 14, makes a feature-by-feature comparison of the proportion of exhibitions of each feature shown in affiliated and unaffiliated theatres. The outstanding feature was *Lady Takes a Chance*, the least attractive was *So This is Washington*. Between the licenses of good and poor box office attractions to the affiliated theatres, the extreme difference was 6.03%. This hardly suggests a concerted plan to discriminate.

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[12] See Appendix E for tabulation of all cities of 25,000 to 100,000 in which RKO features were licensed to affiliated theatres in which RKO had no interest, together with summary of all Record data as to the local competitive situation in each such city.

The plaintiff offered no evidence concerning the comparative quality of the competing theatres in any of the 412 cities, and in its brief ignores the great volume of undisputed evidence offered by the defendants. The first-run status of any theatre is a contractual recognition of its suitability for first-run operation. Not all theatres are suitable for such a run (R. 1900). The size and location of a theatre, its general physical equipment and appointments, its available playing time, and the reliability and ability of its operator, are among the factors which must be evaluated in determining which theatre is best qualified for first-run exhibition[18] (R. 419-20, 1697).

(b) The record is equally clear that RKO does not fit into any purported conspiracy of exclusion whereby independent and non-integrated producers have been shut out of RKO's theatres. In an obvious effort to imply that RKO's affiliated theatres do not afford the features of non-integrated producers a fair proportion of playing time, plaintiff argues (Pl. Br. 56 footnote) that from 35% to 50% of a feature's total domestic gross comes from 3%

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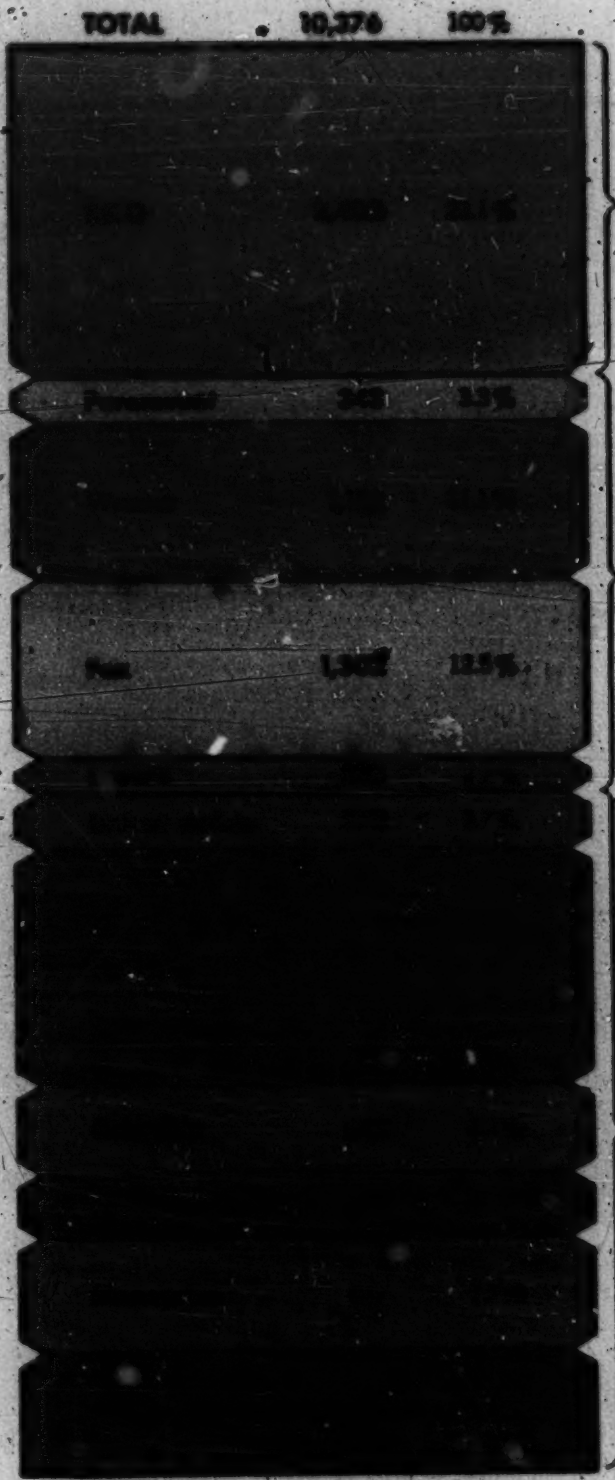
[18] This is well illustrated by Mr. Mochrie's testimony regarding Atlanta, Georgia. In 1943-44 six affiliated theatres (5 affiliated with Paramount and 1 with Loew's) licensed most of the product of seven distributors. One independent operator licensed Columbia's 41 features and 14 features from integrated distributors. These figures are meaningless in a vacuum. The undisputed evidence shows that the independent (the Rialto) is a small theatre of 700-800 seats which licenses certain of RKO's most popular pictures, and runs each four to five weeks (R. 1698). With this product, 41 Columbia, and 9 other features, this theatre's playing time is fully occupied with good product (R. 1739-40) and no complaint by the independent exhibitor is shown. Yet this is supposed to be an example of discrimination, and is so counted in plaintiff's reference to its Exhibit 428, 428A (Pl. Br. 29).

to 4% of its total domestic exhibitions. This is not a recent phenomenon, for at page 75 of its Brief plaintiff points out that in 1927 [*one year before RKO was organized*] "approximately 50% of the revenue from a film [was] derived from first-run showings within six months from the date of its release," *In the Matter of Famous-Players-Lasky Corp.*, 11 F. T. C. 187, at 197 (1927). But in any event, since an outstanding feature normally will show in well over 10,000 theatres (see p. 15 *supra*), the footnoted statistic is merely an observation that 35% to 50% of its gross comes from some 350 to 400 exhibitions—most of which will be first-runs in the 412 larger cities (see tabulation on *Lady Takes a Chance, supra*, page 15). This would seem a reasonable expectation on any market analysis: 77.8% of the people living in cities of 2,500 or more reside in these 412 cities. These cities have the largest theatres playing the longest runs to a population normally having the highest per capita income. Naturally, the best theatres in the larger cities should, and do, contribute a substantial percentage of total rentals (see p. 16). A ten-week exhibition at the 6,000-seat Music Hall in New York's Rockefeller Center (an independent theatre) yields more film rental to the producer than a thousand one-night double-feature showings in tiny theatres such as those in Hawesville, Kentucky. Certainly plaintiff would be quick to attack if RKO attempted to charge the same rental to every theatre. Literally hundreds of theatres would be unable to license at such a figure (see *supra* p. 17).

RKO's theatres cannot operate (with the possible exception of the Palace in New York City) on the product of one distributor (Finding of Fact No. 151, R. 3689). "The percentage of features on the market which any of the five

major defendants could play in its own theatre would be relatively small and in nowise approximates monopoly" (Finding of Fact No. 100, R. 3678). RKO theatres must license features from other distributors, and they consistently accord a large proportion of their playing time to those of non-integrated distributors. RKO Exhibit 8, reproduced here, shows that 47.3% of the exhibitions of features in RKO's first-run theatres and in its New York neighborhood first-run theatres in 1943-44 were from non-integrated companies.



Source:- RKO Film Booking Corp. Records.

At page 348 of the Appendix to the plaintiff's brief, the effort is made to argue that the RKO theatres, although using a large amount of non-integrated products, discriminated against such non-integrated producers by paying therefor an excessively low film rental. This inference is clearly not justified by the record. It is true, of course, that the larger amount of RKO's film rentals is paid to those distributors who on the undisputed evidence released the best features. RKO's theatres paid to RKO in 1943 $3,916,743 for film rental (*of which a substantial amount accrued to the accounts of the independent producers for whom RKO acted as a distributor*). They paid $3,303,206 in the same year to non-integrated distributors, both defendants and non-defendants; and $5,592,611 to the other four integrated defendants. But rental depends in large measure on the box office attractiveness of product. Better features reflect this directly through percentage license terms, others indirectly in flat rentals. The average rental per feature per billing paid by RKO theatres varied widely between the non-integrated defendants: Universal, $1158; Columbia, $1099; United Artists, $510; Monogram, $248; Republic, $231; PRC and all others, $120 (RKO Exs. 8, 9).

The only reasonable inference is that such differences are due to variations in quality. Though absolutes are dangerous, there is truth in the epigram, used by Mr. Wright and adopted by a witness for a non-integrated defendant: "There is no evil in this business that good pictures won't cure" (R. 1297).

Plaintiff called no representative of any independent producer or any non-integrated distributor as a witness. A number of highly prosperous independent producers, who did not appear as witnesses during the trial, have come

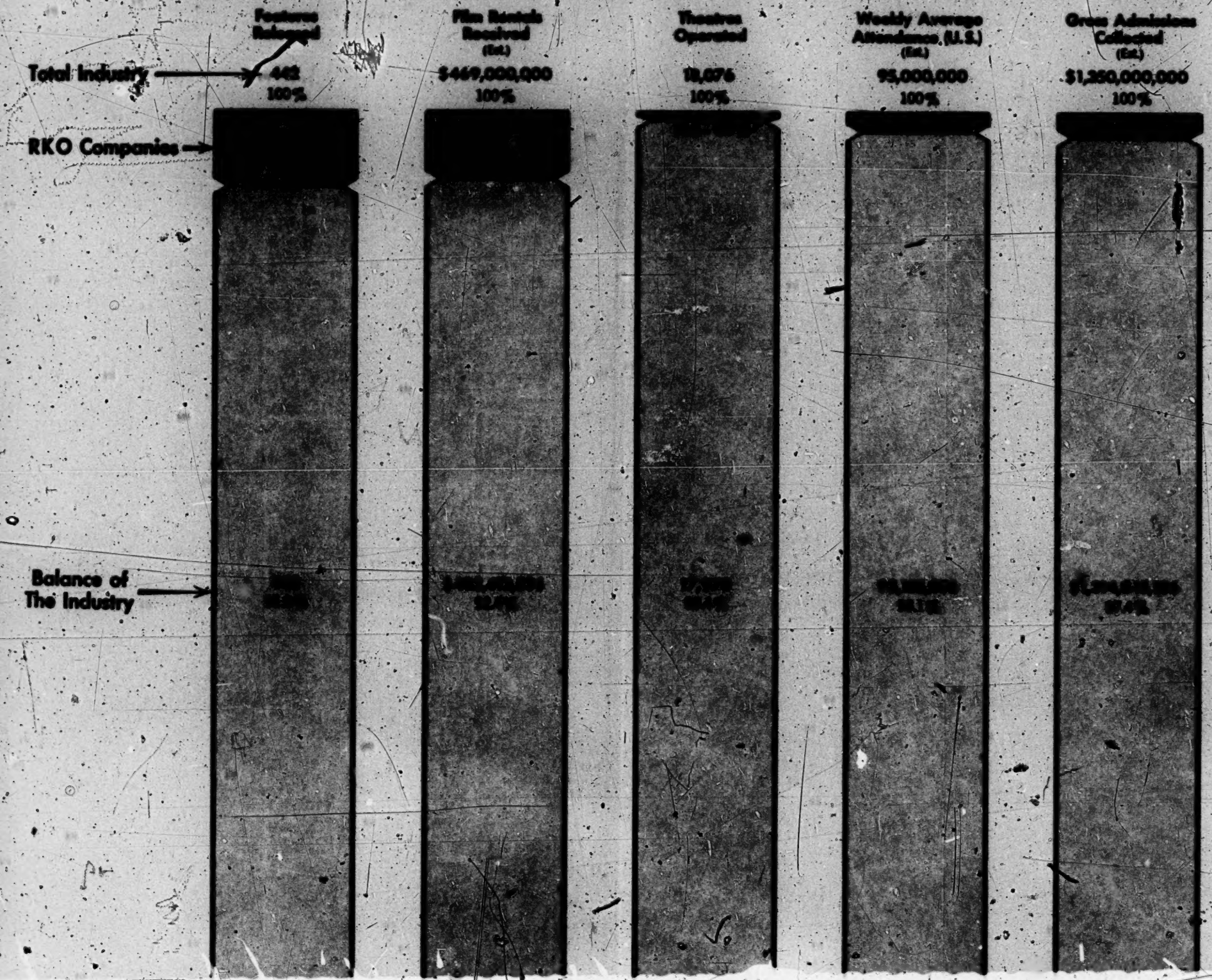
forward in this Court to argue as *amici curiae* on the basis of matter largely outside this record. Representatives of non-integrated distributors having knowledge of the facts were also easily available to testify if plaintiff had wanted them. From plaintiff's failure to call such witnesses the inference would be justifiable that, if called, their testimony would not have supported the plaintiff's thesis. This likelihood is strengthened by the fact that the plaintiff conceded that "the evidence * * * does not show that any particular independent producer who wanted to make a picture could not get it released by one of these [eleven national] distributors * * * I think you have a reasonable assurance that if you are a competent producer and can make a good picture, you can get one of the companies to release it for you" (R. 387, 388).

7. As evidence that "The conspiracy has been extremely successful" the plaintiff urges (Pl. Br. 57, repeated from 19) that 17% of the theatres in the United States pay 45% of the total domestic film rentals received by all eight distributor defendants.

In this connection it should be emphasized that plaintiff's consistent effort to picture RKO as a financially powerful conspirator disregards the facts as to RKO's relative size in the industry. RKO is by no means the giant which the plaintiff would have this Court envisage. RKO Exhibit 2 reproduced here, shows graphically its proportion of five important industry aggregates.

RKO Ex. 2
In Evidence
Witness - Rathvon

PERCENTAGE RELATIONSHIP OF RKO COMPANIES TO THE MOTION PICTURE INDUSTRY IN 1944



Moreover, insofar as profits may be evidence of monopoly power, RKO Exhibit 26, reprinted as Appendix C, reveals the fact that such power has not been reflected in RKO's financial results. In the sixteen years prior to the trial RKO, on gross receipts of $950,000,000, realized a net profit for its shareholders of $3,818,087.31—less than 4¢ of profit out of each $10 of gross receipts. This is not the traditional picture of a monopolistic company whose power has been exerted to oppress the public and to harvest excessive returns.

The abstract statement that 45% of the domestic film rental is paid by 17% of the theatres can in itself furnish no basis for sound inference. The rental paid by any theatre must (and, regardless of the identity of the owner or operator, always will) depend upon the basic factors which, as a matter of sound business judgment, determine its playing position: its size, location, appointments, general characteristics and the ability of its manager, all weighted according to its admission price policy, which in turn is affected by the average *per capita* income of its patrons. Not one of these factors is reflected in the plaintiff's evidence.

Furthermore, analysis shows the close correlation between first-run rentals paid by all theatres regardless of affiliation. The unaffiliated theatres which showed such a large proportion of RKO's product first-run in the 412 cities averaged smaller in size than the affiliated houses, and on the average paid a smaller rental, but the correlation of rental to seating capacity was striking; on three features the rental per seat was identical; on one the rental per seat varied by 1¢ between the two classes of theatres; and on one the variance was 3¢ per seat (see Appendix F). There is no pattern of discrimination in these rentals.

In the preceding subdivisions RKO has met each aggregate figure urged by the plaintiff. In each, the question has been: do the aggregate figures suggest any sort of plan or pattern, and if so does RKO fit into it? The District Court's answer is written into its Findings that RKO's theatres can not be aggregated with those of its competitors to establish general claims of monopolization, and that the net effect of RKO's operations has been to increase competition. We have, we are confident, adequately shown that those Findings are supported by the record.

The plaintiff's contention, put in its strongest frame, comes to this: that RKO, though engaged in the most intense competition at the production, the distribution, and the exhibition levels and though its organization increased competition at each of these levels, and though it acquired its facilities without any predatory practices, must be split because in its distribution contracts it is said to have included certain provisions (no different in substance from those used by the six national distributing organizations which have no theatre affiliates) which the Court has declared violative of law, and because in a few localities it "pooled" theatres or invested in theatre operating companies; and this despite the judicial determination of the trial court that the illegalities found can be effectively eliminated by the system of relief granted.

On the basis of the Findings of Fact and their supporting evidence, we confidently submit that the plaintiff has wholly failed to establish this contention.

VII.

The District Court correctly refused to hold that RKO as an integrated company producing, distributing and exhibiting motion pictures is an unlawful combination.

Plaintiff contends that RKO, *in and of itself*, constitutes "a[n unreasonable][14] restraint and a monopolization of an appreciable segment of trade in violation of Sections 1 and 2 of the Sherman Act" (Pl. Br. 90). The trade which is thus restrained, says plaintiff, is that "represented by the pictures [RKO] distributes to its own theatres" (Pl. Br. 91).

When the plaintiff asserts that each defendant, in and of itself, constitutes an unlawful combination, it converts this law suit into five separate controversies and each defendant must be considered on its own merits. Hence all contentions of combination or conspiracy between the various defendants are abandoned by the plaintiff in so far as this argument is concerned, and RKO must be judged solely upon its own facts.

On this count, also, the District Court disagreed with the plaintiff. It recognized that "Each defendant had a right to build and to own theatres and to exhibit pictures in them" (Opinion, R. 3554). It characterized this as "the ordinary rights of ownership" (*Ibid.*). This was carried into the Decree by the Court's refusal to order the disintegration of RKO and the other exhibitor defendants, and

[14] Plaintiff consistently omits the "unreasonable" in this portion of its argument, but we assume that it does not seriously contend that the "rule of reason" is no longer applicable in anti-trust cases.

by the provision that each might license its own features to its own theatres on terms, satisfactory to itself (R. 3700).

In the Consent Decree of 1940 plaintiff recognized the propriety of RKO exhibiting its features in its own theatres (See Paragraph XXVII, R. 3392). At the trial, plaintiff conceded:

> "Let us assume that you have two distributors of a commodity, two national distributors, and each of them controls a group of retail outlets; and each of these distributors makes agreements with his outlets, under which the outlets act as agents for the sale of his product to the ultimate consumer, and under which agreements he stipulates the price, or a minimum price, at which the product is sold.
>
> "Now, up to this point you have no Sherman Act violation * * *" (R. 1945).

These concessions are directly at variance with the plaintiff's present position. Now it contends that the creation and operation of RKO as an integrated company was unlawful because, it claims, RKO's theatres were acquired "not to meet an expanding business demand resulting from superior skill in film production or distribution" but for the deliberate purpose of obtaining an assured retail outlet for its features regardless of their merits (Pl. Br. 91). It is urged that two unlawful trade restraints result: first, pictures of other distributors are excluded from RKO theatres to the extent that such theatres show RKO features; and, secondly, other theatres are excluded from licensing the RKO features at the time they are shown in the RKO theatres (*Ibid.*).

Plaintiff's argument amounts in essence to the assertion that a producer or a manufacturer can never lawfully acquire retail outlets for the primary purpose of marketing his products because the necessary effects are (a) to exclude other producers or manufacturers from access to such outlets to the extent that they handle their owner's product; and (b) to exclude other retail outlets from access to the producer's products to the extent that the particular items are handled by its own retail outlets. This doctrine finds no support in any decided case. The restraints mentioned are necessarily incident to the lawful ownership and operation of any business. They are not different, for example, from the restraints resulting from a lawful contract for the purchase and sale of particular commodities. As Mr. Justice Douglas said in *Associated Press* v. *United States*, 326 U. S. 1, at 23 (1945):

> "Every exclusive arrangement in the business or commercial field may produce a restraint of trade. A manufacturer who has only one retail outlet for his produce may be said to restrain trade in the sense that other retailers are prevented from dealing in the commodity * * *. But *Standard Oil Co.* v. *United States*, 221 U. S. 1 * * * construed the Sherman Act to include not every restraint but only those which were unreasonable * * *."

Moreover, in this case we are dealing with a copyrighted feature. The right to exhibit its features is specifically granted to RKO as the producer and copyright owner by statute. As the court stated in *Interstate Circuit* v. *United States*, 306 U. S. 208, at p. 227 (1939):

> "Under §1 of the Copyright Act, 35 Stat. 1075, 17 U. S. C. §1, the owners of the copyright of a mo-

tion picture film acquired the right to exhibit the picture and to grant an exclusive or restrictive license to others to exhibit it.'

Even without regard to the Copyright Act, however, the anti-trust laws do not prevent RKO from acquiring retail outlets for the purpose of marketing its products. It is true that an unreasonable restraint of trade may exist within a vertically integrated industrial complex, but this must rest on proof beyond the mere fact that the enterprise operates at two or more levels of the production-distribution-exhibition process. Whether vertical integration violates the anti-trust laws depends upon whether its purpose or necessary effect is unreasonably to restrain or to monopolize trade in the various business levels in which the enterprise is engaged. Vertical integration in essence is nothing more than a union of non-competing complementary enterprises. The courts have consistently held that the union of such enterprises for business purposes unconnected with any design to monopolize or restrain the trade in which the constituent enterprises are engaged is not violative of the Act. *United States* v. *Winslow*, 227 U. S. 202 (1913); *United States* v. *United Shoe Machinery Company*, 247 U. S. 32 (1917); *United States* v. *Standard Oil Company, of New Jersey*, 47 F. (2d) 288 (E. D. Mo. 1931); *Alexander Milburn Company* v. *Union Carbide & Carbon Corp.*, 15 F. (2d) 678 (C. C. A. 4, 1926) cert. den. 273 U. S. 757 (1927). See also *Eastman Kodak Co.* v. *Federal Trade Commission*, 7 F. (2d) 994 (C. C. A. 2d, 1925) affd. 274 U. S. 619 (1927); *United States* v. *United States Steel Corporation*, 251 U. S. 417 (1919), affirming 223 Fed. 55 (D. N. J., 1915).

In support of its theory that a producer cannot market its own products through its own retail outlets, the plaintiff

relies primarily on *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255 (1920) and *United States* v. *Reading Co.*, 253 U. S. 26 (1920). These cases are clearly distinguishable. In each case the Court found that the combination had already acquired a dominant control of the anthracite coal land served by the carriers involved, and of the railroads over which the coal had to pass to reach its market. The Court also found that such lands were acquired with the intent to monopolize and in fact had monopolized the production, transportation and sale of coal. There are no Findings of Fact and there is no evidence here that RKO acquired any theatre for the purpose or with the effect of eliminating competition in the distribution or exhibition of motion pictures. The Court found the direct opposite: it found that RKO's organization increased competition at each of the three levels of the industry (Findings of Fact No. 20, 23, 121, R. 3664, 2684, quoted *supra* pp. 9-10).

The Government also refers to *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947). In that case the Court had before it a motion directed to the pleadings. The basic allegation was that the combination there considered was for the express purpose of unduly restraining and monopolizing an important segment of interstate commerce. The case stands merely for the proposition that unreasonable restraints of trade can be effected by vertical combinations as well as by horizontal combinations. The form of combination is immaterial. If the "primary object" of a vertical combination is to eliminate and unduly restrain competition, the Act, of course, is violated. As previously shown, there is no evidence and there are no Findings that RKO acquired theatres with the object, primary or otherwise, of unduly restraining or monopolizing trade either in

distribution or exhibition. All the Findings are that the contrary object motivated RKO and that the contrary result followed.

In *United States* v. *Swift & Co.*, 286 U. S. 106 (1932) the sole question involved was whether the Court should revise a consent decree under which the defendants had voluntarily agreed to an injunction barring them from certain fields of activity. This Court made clear the limited nature of the issue: "We are not framing a decree. We are asking ourselves whether anything has happened that will justify our changing the decree" (p. 119). Since the Court found that there had been no change in the conditions which would warrant a modification, the defendants were left subject to the injunction to which they had consented.

Neither of the other cases cited by the plaintiff, *Associated Press* v. *United States*, 326 U. S. 1 (1945); *Binderup* v. *Pathe Exchange*, 263 U. S. 291 (1923) or *United States* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944) has any relevancy to the legality of vertical integration.

VIII.

Since the Decree of the District Court is adequate to prevent the continuance or repetition of all acts which the Court deemed violative of the Sherman Act, its refusal to order RKO to divest itself of its theatres or its production-distribution facilities was not an abuse of discretion.

Plaintiff demands the dissolution of RKO together with a supplementary injunction against RKO licensing its features to other affiliated theatres and against RKO's theatres exhibiting features distributed by other integrated defendants. To prevail, the plaintiff must establish (A)

that the refusal of the District Court to grant such relief was an abuse of discretion; and (B) that the particular relief demanded is so clearly the only appropriate remedy that this Court should substitute it for the relief granted below.

The analysis in Point I-A, p. 39, *supra*, demonstrates that the Decree adequately meets every violation of the Sherman Act which the District Court concluded existed in this case. The Decree rested upon the District Court's findings that competition

> "* * * can be introduced into the present system of fixed admission prices, clearances, and runs, by requiring a defendant distributor when licensing its features to grant the license for each run at a reasonable clearance (if clearance is involved) to the highest bidder, if such bidder is responsible and has a theatre of a size, location, and equipment adequate to yield a reasonable return to the licensor. In other words, if two theatres are bidding and are fairly comparable, the one offering the best terms shall receive the license * * *" (Finding of Fact No. 85, R. 3674).
>
> "The discriminations referred to in Finding 110 would appear to be impossible under a system where the exhibitors competing for a license to exhibit a given feature on a given run do so on a parity since the same offer must be made to all prospective exhibitors in each competitive area" (Finding of Fact No. 111, R. 3682).
>
> "Total divestiture would be injurious to the corporations concerned and would be damaging to the public" (Finding of Fact No. 155, R. 3960).
>
> "Total divestiture would not remedy the * * * practices which have been found unreasonably to restrain competition" (Finding of Fact No. 156, R. 3690).

Accordingly, the Court framed a Decree (R. 3694ff) which attacked the problems of the industry constructively:

It ordered that each feature be individually offered and licensed "theatre by theatre and picture by picture" (II-8-(d)), and each "license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or others" (II-8-(b)). Provisions fixing minimum admission prices were (erroneously, we believe, see Points III and IV) prohibited, as was clearance between theatres not in competition and unreasonable clearance between those in competition. Franchises, formula deals, master agreements, and block booking were outlawed.

Each distributor was enjoined from arbitrarily selecting one of two or more exhibitors to play a feature on a run desired by both (II-9). This provision, which is nowhere mentioned by the plaintiff, in one sentence demolishes any fixed pattern of runs which may have existed. The District Court wisely recognized that neither it, nor anyone else, could by any form of Decree assure every one of the 18,000 theatres in the United States that it could have any run which it demanded.

If the Decree had stopped at this point, it would have accorded full relief against all the violations found. It would have provided that no exhibitor shall be arbitrarily denied the right to exhibit any picture on the run he desires, and it would have assured that all licenses shall be granted picture by picture and theatre by theatre.

But the District Court went further. It provided for the situation where a run "is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres" (II-8-(c)). Here the distributor is to offer to all competing exhibitors, 30 days in advance of the

date "bids" are to be received, each individual feature, stating "knockdown terms" as to run, clearance, time of exhibition, and minimum flat rental. Each exhibitor may then make the offer which, considering the quality of his theatre and patronage, and his estimate as to the attractiveness of the picture, constitutes in his judgment a fair rental if it be exhibited on the run in question at his theatre. The distributor may reject all offers but if he accepts any, must "grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor."

This is in brief outline the constructive system of competition which the Decree substitutes for the present distribution practices. It is attacked by the plaintiff and others. The Amended and Supplemental Complaint (R. 3173, 3176) complained of the lack of competitive bidding and it was Mr. Wright, chief trial counsel for the plaintiff, who said he did "not see why [features] should not go on the auction block" (R. 2556).

The Decree's system of competitive selling varies in a number of respects from that proposed by Paramount, Loew, Fox, Warner and RKO and set forth at R. 3613. It is not RKO's contention that the system substituted by the Court for this proposal is better or worse, or that it is perfect. But RKO believes it does establish the basis of a workable system of free competitive negotiation. It may be assumed that the District Court will freely exercise its reserved jurisdiction either to modify the system if it be found procedurally inept in any way, or to strengthen it if it proves inadequate in any detail.

A. The adequacy of the Decree is not impugned by prior experience in the motion picture industry.

The plaintiff contends that the District Court ignored certain historical material which it now presses on this Court (Pl. Br. 72-89). It is unlikely that this is true. 'At the trial plaintiff proposed to offer in evidence twenty-five exhibits dealing with various court and Federal Trade Commission proceedings. Of the first item offered, a special master's report in a District Court case in Chicago, Judge Hand remarked: "We won't receive any such thing as that. This is absurd" (R. 297). Of an indictment on which the jury had found the defendants not guilty, his comment was equally positive: "I think it is absurd. You cannot put such stuff in" (R. 300).

Thereupon all the proposed exhibits were withdrawn, with the observation that these "may be referred to by this Court" (R. 300), to which Judge Hand's comment was illuminating: "You can do that with anything" (R. 302).

Despite the fact that it referred freely to these items, the plaintiff signally failed to convince the judges of the District Court, who said:

> "* * * The defendants have built up great business enterprises in a very popular field. Yet they have carried on practices we have found unduly restrictive of interstate commerce and even though we do not suggest that they any more than 'those eighteen upon whom the tower in Siloam fell' have been 'sinners above all men', yet measures should be taken to restore the moving picture business to a condition of competition that will benefit both competitors and the general public and to abate practices that are unlawful" (R. 3558).

The District Court, in its Finding of Fact, also denied any "'inherent vice' on the part of these defendants" (Finding of Fact No. 153, R. 3690).

We cite the Opinion and Finding only as indicative that the District Court, after careful study, could not agree with plaintiff's insistence that the defendants were inherently vicious. We turn now briefly to the "past experience":

1. *Federal Trade Commission* (Pl. Br. 73-78). Neither RKO, nor any of its predecessor companies, nor any of its officers or executives, has ever been charged before the Federal Trade Commission with unfair competition or any other offense within the Commission's jurisdiction. Both of the proceedings cited by the plaintiff, *In the Matter of Famous-Players-Lasky Corporation, et al.*, 11 F. T. C. 187, and *In the Matter of West Coast Theatres, Inc.*, 12 F. T. C. 383, were instituted prior to RKO's organization and dealt with the industry as it then existed. RKO therefore has no occasion to discuss the merits of the complaints.[15]

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[15] One example of the carelessness of plaintiff in comparing figures may be noted. The footnote on p. 75 of plaintiff's Brief incompletely recites the finding of the Commission regarding revenue from first-runs. The full finding was that "approximately 50% of the revenue from a film is derived from first-run showings within six months from the date of its release, and the remaining revenue from second and repeat runs in other theatres, extending over a period of two or three years (11 F. T. C. at 197)." Plaintiff submits as comparable the assertion that 80% of the total rental earned *in large cities* comes from the first-run theatres. The proportion of *the domestic gross from all theatres* the F. T. C. statistic) is obviously not comparable with the proportion of *the revenue from a large city paid by first-run theatres* (the second asserted statistic).

2. *Government Antitrust Suits* (Pl. Br. 78-85). The plaintiff cites *United States* v. *West Coast Theatres, Inc.*; *United States* v. *Balaban & Katz Corp.*; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30 (1930) and *United States* v. *First National Pictures, Inc.*, 282 U. S. 44 (1930), all of which were instituted in 1928. That was the year in which the organization of RKO "increase[d] competition in each of the three branches of the industry"—production, distribution and exhibition (Finding of Fact No. 23, R. 3664; see also Finding of Fact No. 121, R. 3684).

RKO was not named as an original defendant in any of these cases, and none of them involved any activities of the theatres which it later acquired.

RKO was not a defendant in the later equity proceedings in *United States* v. *West Coast Theatres*, which resulted in the Consent Decree of August 21, 1930. In January, 1931, RKO acquired a part of the assets of the Pathe Exchange, which had been a defendant therein; and hence was named in the contempt proceedings instituted in August 1939. The contempt charge was never determined by the Court, and the mere accusation certainly does not convict RKO.

Similarly, although not an original defendant, in *United States* v. *Balaban & Katz Corp.* (N. D. Ill.), RKO was named as a defendant in the contempt information of November 9, 1938. In the course of the hearing before the Master, counsel for the government entered into a written stipulation reading in part as follows:

> *"It has conceded that in any view of the case evidence does not establish a violation of any paragraph of the decree against the defendants, RKO and Universal."* See Master's Report, cited by plaintiff at Pl. Br. 79, paragraph IV, italics added.

The only other government case mentioned by the plaintiff is *Interstate Circuit* v. *United States*, 306 U. S. 208 (1939). Nothing in this case even suggests any impropriety in RKO's relations with its theatres.[16]

Thus not one of these cases casts the slightest doubt on the trial court's conclusion that the appropriate way to remove the impact of distribution practices it deemed improper was to prohibit them and affirmatively to outline a system of competitive negotiation.

3. *NRA Code and Consent Decree of 1940* (Pl. Br. 58-87). There is no evidence in this record as to the NRA Code of Fair Competition, or the activities of the various local boards set up under such Code. There is not the slightest intimation that the fact that RKO had theatres contributed either to the success or failure of that program.

The Consent Decree can hardly be used to taint RKO. The plaintiff agreed to that Decree. RKO entered into it in good faith, RKO observed it in letter and spirit, and the only inference to be drawn from this fact is that it will similarly observe any decree entered in this cause.

4. *Private Antitrust Suits* (Pl. Br. 87-88). RKO Radio Pictures, Inc. has been named in most of the private antitrust suits filed in recent years, though in some no RKO company is a defendant. Many resulted in judgments for the defendants; a number have been determined in favor of the plaintiffs. Not one which has been determined in favor of any plaintiff has involved an RKO theatre or an RKO theatre operating company.

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[16] The plaintiff's reference to RKO in connection with a claim that clearance in Sioux City, Iowa, is related to double billing (Pl. Br. 85) is evidently a misprint, since Gov. Ex. 94, cited in support, makes no reference to any such restriction.

We believe that this Court has a sufficient task in deciding the present appeal without undertaking to investigate the peculiar local issues of a number of private suits. It would be impossible, for instance, to go into details concerning such cases as *Duluth Theatres Corp.* v. *Paramount, et al.*, No. 2335, District of Minnesota, which resulted in 1946 in summary judgment for RKO; or *Ball* v. *Paramount*, 67 F. Supp. 1 (W. D. Pa. 1946), which resulted on August 30, 1946, after trial, in judgment for the defendants; or *Momand* v. *Universal*, No. 7024, District Court of Massachusetts, which resulted on February 13, 1947, in an instructed verdict for the defendants. Each suit involves its own unique local issues, and it may be assumed that the trial courts are capable of handling them as they are reached on the dockets.

5. *Conclusion.* Nothing in "history" as recited by the plaintiff suggests any intention, much less any effort, on the part of RKO to use its 106 theatres to injure its competitors, or to combine so as to abuse them. The significant fact is that plaintiff has cited no case, and there is no case, where theatre abuse has been found against RKO. It has cited no instance where RKO has failed to live up to any decree entered in any case where it, or a predecessor company, was a distributor defendant.

B. The authorities fully sustain the refusal of the District Court to order the dissolution of RKO.

1. The violations found do not establish a situation where dissolution is the appropriate remedy.

The authorities of the past half century establish that dissolution of a corporate defendant who has violated

the Sherman Act is not the normal remedy, though it will be granted when necessary. Such necessity is shown only when the gravamen of the offense is the creation of the corporation dissolved, and where the dominant position of the corporation results from the acquisition of competitors with the intent or the necessary effect of unduly restraining and monopolizing commerce. *Northern Securities Co.* v. *United States*, 193 U. S. 197 (1904); *Standard Oil* v. *United States*, 221 U. S. 1 (1911); *United States* v. *American Tobacco Co.*, 221 U. S. 106 (1911); *United States* v. *E. I. du Pont de Nemours & Co.*, 188 Fed. 127 (C. C. Del., 1911); *United States* v. *Union Pacific R. Co.*, 226 U. S. 61 (1912); *United States* v. *Southern Pacific Co.*, 259 U. S. 214 (1922); *United States* v. *Eastman Kodak Co.*, 226 Fed. 62 (D. W. N. Y. 1915), 230 Fed. 522 (1916); *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S. D. N. Y. 1916), app. dism. 249 U. S. 621 (1919); *United States* v. *Reading Co.*, 253 U. S. 26 (1920); *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255 (1920).

Even in cases where a corporation is unlawfully formed or monopoly is unlawfully maintained, dissolution is not granted as of course. It is used sparingly, and only when relief short of dissolution is clearly inadequate. The courts have repeatedly refused to order dissolution in cases where violations of the Act could be met adequately by less drastic remedies. *United States* v. *Terminal Railroad Association*, 224 U. S. 383 (1912); *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733 (N. D. Ohio 1913), 217 Fed. 656 (N. D. Ohio 1914); *United States* v. *Keystone Watch Case Co.*, 218 Fed. 502 (E. D. Pa. 1915), app. dism. 257 U. S. 664 (1921); *United States* v. *American Can Co.*, 230 Fed. 859 (D. Md., 1916); *United States* v. *Quaker Oats Co.*, 232 Fed. 499 (N. D. Ill., 1916), app. dism. 253 U. S. 499 (1920);

United States v. *United States Steel Corp.*, 251 U. S. 417 (1920); *United States* v. *International Harvester Co.*, 274 U. S. 693 (1927); *United States* v. *Aluminum Co.*, 148 F. (2d) 416 (C. C. A. 2nd 1945); *United States* v. *National Lead Co.*, 332 U. S. 319 (1947).

The present case is not one in which dissolution is appropriate. The District Court found a conspiracy of eight separate defendants, and by its Decree ended that conspiracy. RKO, as a separate entity, was found to have been created for a lawful purpose and to have had the effect of creating new competition in each field in which it operated. In such a setting, divorcement would go far beyond the restraint of violations and would be an effort by judicial fiat to rebuild the industry.

As the Court stated in *United States* v. *National Lead Co.*, *supra*:

> "There is no showing that four major competing units would be preferable to two, or * * * that six would be better than four. Likewise, there is no showing of the necessity for this divestiture of plants or of its practicality and fairness. The findings of fact have shown vigorous and effective competition * * * in this field * * *. Such competition suggests that the District Court could do well to remove unlawful handicaps from it but demonstrates no sufficient basis for weakening its force by divesting each of the two largest competitors of one of its principal plants. It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion."

2. The District Court correctly took into consideration, in exercising its discretion, the injury to the corporate defendants and to the public which would result from divestiture.

The plaintiff criticizes the District Court (Pl. Br. 119) because, as one factor in the determination of the remedy which it fitted to the illegalities it found, that Court took into consideration the harm which would result to the defendants and the public from what it described as "the harsh remedy of complete divestiture" (R. 3551, 3559).

In adopting this constructive approach the District Court followed a principle laid down by numerous decisions. *Standard Oil* v. *United States*, 221 U. S. 1, 77-78 (1911); *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185 (1911); *United States* v. *Terminal Railroad Assn.*, 224 U. S. 383, 411 (1912); *Sugar Institute* v. *United States*, 297 U. S. 553, 604 (1936); *United States* v. *Great Lakes Towing Co., supra*, at 217 Fed. 656 (N. D. Ohio 1914).

Upon consideration of the record, the Court found (Finding of Fact No. 155, R. 3690):

> "Total divestiture would be injurious to the corporations concerned and would be damaging to the public."

In its Opinion the Court stated that divestiture would "withdraw the defendant distributors from competition in the exhibition field and at the same time would create a new set of theatre owners which would be quite unlikely for some years to give the public as good service as the exhibitors they have supplanted in view of the latter's demonstrated experience and skill in operating what must be regarded in general as the largest and best equipped theatres" (R. 3551).

Plaintiff argues that there are two answers to the Court's concern over damage to the public: first, that there is nothing in the record to suggest that independent interests cannot give the public as good service as the defendants; and secondly, that if the violations found can be eliminated only by divestiture, it would be paradoxical to deny the relief on the ground of public injury, since Congress has decided that competition is to the greater public advantage.

Regarding the plaintiff's first contention, the Court was eminently justified in concluding that divestiture would be injurious to the public. For example, subsidiary findings, based on the undisputed evidence, were made by the court to the effect that the ownership and operation of theatres by RKO enables it, through the use of such theatres, to plan and direct more effectively the first exploitation of the features it distributes than is possible in the areas where it does not operate theatres, which results not only in greater revenue for it, but also for the subsequent-run exhibitors (Findings of Fact Nos. 122, 123, R. 3685). There is also undisputed evidence that the quality of the motion pictures made by the five theatre-owning defendants would be jeopardized by divorcement (R. 1827), that, for example, the ownership of theatres has enabled RKO to take the risk of experimenting with new types of pictures, which have advanced the art (R. 1623-24).

The short answer to the plaintiff's second contention is that it is based upon a hypothetical proposition which the Court below expressly repudiated. *If* improprieties can be eliminated only by divorcement, plaintiff says, *then* the court's position is contradictory. The Court below concluded that they can and will be eliminated by the relief

given. The plaintiff's attempted answer is but an assignment of error.[17]

C. The District Court correctly refused the plaintiff's demand that RKO be enjoined from licensing theatres affiliated with other defendants, and that the other producer-exhibitor defendants be enjoined from licensing RKO theatres.

Plaintiff seeks to have this Court rewrite the Decree so that each producer-exhibitor shall be enjoined for a ten year period from licensing any feature it distributes to any theatre affiliated with another defendant. This relief was demanded first some two months after the trial ended. Prior to the arguments on January 15, 1946, the idea had not been mentioned.[18] It was first suggested by plaintiff, not as a demand for relief but as an "example" of an "alternative" remedy for which "these defendants might conceivably argue" (R. 2568). But, faced by the District Court's re-

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[17] It is interesting to note that plaintiff refers to a legislative determination that divorcement is in the public interest (Pl. Br. 133, f.n. 5a). It is true that North Dakota in 1937 passed a statute making it unlawful for any motion picture theatre in which a producer or a distributor had an interest, to be operated in the state (Chapter 165, Laws of North Dakota, 1937). It repealed the law in 1939 (Chapter 203, Laws of North Dakota 1939). Apparently the legislature soon discovered that divorcement was not in the public interest. But in any event, the courts are not legislative organs.

[18] Plaintiff's Brief (p. 9) filed December 15, 1946, called for divestiture and for interim relief, pending divestiture, "which will prevent the use by any of them of licensing restrictions or other agreements between any two or more of them which have the effect of fixing, directly or indirectly, the admission prices in affiliated theatres or other theatres competing with such theatres, or which have the effect of excluding such competitor from any part of the theatre operating business" (Pl. Br., p. 9).

fusal to order divestiture, plaintiff evidently found the idea increasingly seductive. By October, 1946, it achieved maturity: the plaintiff's second proposed decree urged the ten year ban (R. 2601). By October 24th, it became the plaintiff's "key proposal" (R. 3000).

The strange aspect of this demand is that it bears most oppressively on the smallest defendants, RKO and Loew's. So long as RKO retained a single theatre, say in Marshalltown, Iowa, its features would be shut out of every affiliated theatre in the United States.

Plaintiff's argument rests upon its theory that RKO, as a distributor, will discriminate in favor of theatres affiliated with another defendant as against independent competitors for the purpose of inducing the other defendants to discriminate elsewhere in favor of the RKO theatres (Pl. Br. 128). We have demonstrated above the fact that RKO has not so discriminated in the past, and there is no reason to assume it will in the future. Here we show that the proposed ban on "cross licensing" is but an indirect method of compelling RKO to divest itself of all its theatres. Plaintiff concedes there is no precedent for such relief (Pl. Br. 133).

The ban proposed by the plaintiff would bar an integrated defendant "from licensing for exhibition in any theatre owned or controlled by it, films *distributed* or *produced* by" another integrated defendant (R. 3601). It must be considered from two angles: (1) the effect on RKO as a distributor; and (2) the effect on RKO as an exhibitor.

(1) *The effect on RKO as a distributor*

The ban on so-called "cross-licensing" would deprive RKO as a distributor of the income derived from the distribution of the productions of independent producers. Dis-

tribution of independently produced features has been an important part of RKO's business. "Continuously since its organization RKO has distributed features for independent producers. The particular independent producers whose features have been distributed by RKO have varied from time to time. In the nine seasons ending 1943-44, 19.8% of the features distributed by RKO were independently produced, and 28.4% of RKO's gross receipts from domestic licenses of features was derived from such independently produced features" (Finding of Fact No. 101, R. 3678). No independent producer could utilize the distribution facilities of RKO if thereby he was barred from some 3000 of the largest and finest theatres in the United States.

Had such a ban as the government now proposes been in effect during the first five motion picture seasons after RKO emerged from its reorganization, it would have deprived RKO of its service fees on the $55,000,000 of receipts it collected for these independent producers (RKO Exs. 5, 6).

Furthermore, a ban on so-called "cross licensing" would materially impair RKO's revenue as a distributor of its own productions. An injunction which would bar RKO from licensing its features for exhibition in theatres affiliated with any other defendant would shut RKO out of some 3,000 theatres, including "many or most of the best theatres" in the United States (Finding of Fact No. 154, R. 3690). In 1943-44 RKO's fees for features produced by it included approximately $5,750,000 from theatres affiliated with other defendants (RKO Exs. 5, 7).

The *immediate* result on RKO as a distributor, therefore, would be to reduce its gross receipts from rentals by

over 50%, i.e., using 1943-44 as a sample year, from $28,457,337 to $13,923,287.[19]

RKO as a producer and distributor obviously could not successfully operate with its own features barred from 3,000 theatres, including the largest and best in the country, and its distributing organization blocked from its traditional reliance on independent producers. From the standpoint of its effect on RKO as a producer-distributor, *the so-called ban on "cross-licensing" is but a veiled form of compulsory divorcement.*

(2) *The effect on RKO as an exhibitor.*

The blow to RKO as an exhibitor would be only slightly less severe. The product which played during the 1943-44 season in RKO's 93 principal theatres is tabulated in RKO Exhibit 8A. "It would be financially impossible for RKO to operate its theatres on features produced by RKO alone" (Finding of Fact No. 102, R. 3678). Indeed, found the Court "except for a limited number of theatres in the very largest cities, the 18,000 * * * theatres * * * in the United States exhibit the product of more than one distributor. Such theatres could not be operated on the product of only one distributor" (Finding of Fact No. 151, R. 3689). In the year in question, RKO relied far more heavily on the features of the non-integrated distributors than upon those

[19]

Gross receipts from film rentals		$28,457,337
Receipts for independent productions	$8,802,780	
Estimated receipts for RKO product in theatres affiliated with other defendants	5,731,270	14,534,050
Source: RKO Exs. 5 and 7.		$13,923,287

of its integrated competitors.[20] Now it would be compelled to rely upon them exclusively. Most of the attractive features come from the five producer-exhibitor defendants and United Artists. The product of the other seven national distributors, though including some outstanding box office features, is in general of substantially lower cost and of less attractiveness to the patron (R. 543, 873, 910, 1293, 1300, 1945; Pl. Exs. 426, 427).

RKO's theatres could not maintain their positions in the artificially restricted environment which the proposed ban would create. No justification has been shown for the shackling of their ability to compete on a fair and equal basis which would justify barring them from access to the fine features which may be produced by Fox, Warner's, Loew's or Paramount.

It is, of course, hardly surprising to find the non-integrated defendants favoring the proposed ban on "cross licenses." The creation of a wholly artificial demand for their product, and at the same time the creation of an artificial scarcity by blocking off their more able competitors, all to be accomplished by judicial fiat, would obviously appeal to them as an outcome highly desirable.

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[20] In the year in question RKO's 93 leading theatres exhibited:

Universal features	1,718	engagements
Fox "	1,302	"
Warner "	1,153	"
MISCELLANEOUS MINOR PRODUCERS' features	883	"
MONOGRAM "	817	"
Columbia "	643	"
REPUBLIC "	455	"
United Artists features	378	"
Paramount "	343	"
Loew's "	283	"

(Source: RKO Ex. 8, reproduced at p.).
(Italics: non-integrated defendants; capitalized italics: non-integrated distributors who are not defendants.)

It is equally clear that the same motive is to be found in the support given by the independent producers to the demand for a ban on "cross-licenses." There is no evidence to support their contentions, so they have gone freely outside the record for their arguments. But it does not take any great perspicacity to appraise their motives. No doubt they envisage with consummate satisfaction the bonanza which could be opened to them by securing a judicial ban which would bar the features of integrated producers from theatres affiliated with other distributors. With their superior competitors artificially blocked from the market, and with the best theatres in the country strangling under the proposed ban, the independent producers would reap the harvest of exorbitant fees.

And the same motive, of course, underlies the assault of the so-called "independent" exhibitors. Banned together frequently in circuits and buying combines, these operators are naturally eager to secure a further leverage in their negotiations for product. What more fortunate windfall could come to them than a decree which would bar RKO and other major product from "many if not most of the best theatres," and would force its exhibition in inferior theatres for such bargain license fees as the exhibitor chose to dole out on his judicially created buyers' market?

The only person who has not been heard from is the very one whose interest should be paramount: the theatre patron. What is the profit to this unrepresented consumer if the best theatres in his city are thus shut off from the best features produced in the country? The District Court looked upon this question with understanding based upon a year of study of this record, and correctly denied the plaintiff's demand for this unprecedented type of relief.

CONCLUSION

It is respectfully submitted that the assignments of error of the United States to the Decree of the District Court are not well taken, and that insofar as it is challenged by the United States such Decree should be affirmed.

Dated, February 2, 1948.

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APPENDIX A

Table Showing Competing Affiliated and Unaffiliated Theatres Operating on First-Run Policy in Cities Where RKO Operates First-Run Theatres

A. In cities of over 100,000 population[1]

City	RKO Theatres	Affiliated Theatres[2]	Unaffiliated Theatres[3]
Los Angeles, Cal.[4]	1—Hillstreet	6—Los Angeles (F) Orpheum (F) Paramount (P) State (F) United Artists (F) Warner (W)	2—California Music Hall
San Francisco, Cal.	1—Golden Gate	5—Fox (P & F) Paramount (P & F) Warfield (P & F) St. Francis (P & F) State (P & F)	4—Orpheum United Artists Esquire Tivoli
Denver, Col.	1—Orpheum[5]	5—Denver (F) Paramount (F) Esquire (F) Aladdin (F) Rialto (F)	1—Denham
Chicago, Ill.	2—Grand Palace	7—Apollo (P) Chicago (P) Garrick (P) McVickers (P) State-Lake (P) United Artists (P) Roosevelt (P)	3—World Playhouse Oriental Woods

City	RKO Theatres	Affiliated Theatres	Unaffiliated Theatres
Des Moines, Iowa	1—Orpheum	3—Des Moines (P) Paramount (P) Roosevelt (P)	
New Orleans, La.	2—Orpheum Liberty	4—Saenger (P) Globe (P) Tudor (P) Loew's State (L)	1—Center
Boston, Mass.	2—Keith's Memorial RKO Boston	5—Metropolitan (P) Paramount (P) Fenway (P) Loew's State (L) Loew's Orpheum (L)	2—Majestic Translux
Lowell, Mass.	1—RKO Keith's	2—Strand (P) Merrimac Square (P)	
Grand Rapids, Mich.	2—Keith[6] Regent[6]	3—Center (R & P)[6, 7] Kent (R & P)[6, 7] Majestic (R & P)[6, 7]	
Minneapolis, Minn.	1—Orpheum[6]	6—Radio City (P)[6] State (P)[6] Aster (P)[6] Century (P)[6] Gopher (P)[6] Lyric (P)[6]	1—World
St. Paul, Minn.	1—Orpheum[6]	4—Paramount (P)[6] Riviera (P)[6] Tower (P)[6] Strand (P)[6]	1—World

City	RKO Theatres	Affiliated Theatres	Unaffiliated Theatres
Kansas City, Mo.	1—Orpheum	5—Uptown (F) Esquire (F) Tower (F) Midland (L) Newman (P)	
Omaha, Neb.	1—Brandeis	3—Orpheum (P) Paramount (P) Omaha (P)	
Newark, N. J.	1—Proctor's[5]	4—Paramount (P) Adams (P) Branford (W) Loew's State (L)	
Trenton, N. J.	5—Lincoln[5] Capitol[5] State[5] Palace[5] Trent[5]		2—Stacy Mayfair
Brooklyn, N. Y.[8]	1—Albee	4—Paramount (P & W) Fox (P & W) Strand (P & W) Metropolitan (L)	
New York City, Manhattan, N. Y.	1—Palace	9—Victoria (L) Criterion (L) Loew's State (L) Hollywood (L) Capitol (L) Rivoli (P) Paramount (P) Strand (W) Roxy (F)	8—Globe Gotham Rialto Music Hall Astor Republic Ambassador Winter Garden

City	RKO Theatres	Affiliated Theatres	Unaffiliated Theatres
Rochester, N. Y.	2—Palace[6] Temple[6]	3—Century (P)[6] Regent (P)[6] Rochester (L)	
Syracuse, N. Y.	2—Keith[6] Empire[6]	1—Loew's State (L)	2—Eckel[6] Paramount[6]
Yonkers, N. Y.	1—Proctor's	1—Loew's Yonkers (L)	
Cincinnati, O.	8—Albee Capitol Grand Palace Lyric Shubert Family		1—Keith[5]
Cleveland, Ohio	2—Allen[6] Palace[6]	5—Lake (W)[6] Hippodrome (W)[6] State (L) Stillman (L) Ohio (L)	
Columbus, O.	2—Palace Grand	2—Ohio (L) Broad (L)	
Dayton, O.	3—Keith Colonial State	1—Loew's (L)	1—Victory
Providence, R. I.	1—Albee	2—Carlton (L) State (L)	3—Majestic Fays Strand

City	RKO Theatres	Affiliated Theatres	Unaffiliated Theatres
Washington, D. C.	1—Keith's	5—Loew's Palace (L) Capitol (L) Columbia (L) Earle (W) Metropolitan (W)	1—Little

[1] Based upon RKO Ex. 1, Loew's Ex. 13 and RKO Ex. 11.

[2] Affiliated theatres are considered to be those in which one or more of the defendants have an interest. Where two companies are shown as interested in the same theatre, this information is as of the date of trial.

[3] Unaffiliated theatres are considered to be those in which no defendant has any interest.

[4] R. 2125.

[5] RKO has 50% interest.

[6] These theatres were at or prior to the time of the trial subject to a local operating agreement which is no longer in effect.

[7] RKO has a 10% stock interest in the company operating these theatres.

[8] Based upon RKO Ex. 4.

[9] At the time of the trial the Keith Theatre was operated by the United Theatre Corporation, in which RKO had an interest of 15.4%. RKO has sold this interest (Compliance Report, July 1, 1947).

City	RKO Theatres	Affiliated Theatres	Unaffiliated Theatres
Cedar Rapids, Iowa	1—Iowa	2—Paramount (P) State (P)	
Davenport, Iowa	1—Orpheum	2—Esquire (P) Capitol (P)	
Dubuque, Iowa	1—Orpheum[2]		2—Avon[2] Grand[2]
Sioux City, Iowa	1—Orpheum	2—Capitol (P) Princess[2]	
Waterloo, Iowa	1—Orpheum	2—Paramount (P) Strand (P)	1—Iowa
New Brunswick, N. J.	3—Albany[4] Rivoli[4] State[4]		1—Opera
Union City, N. J.	1—Capitol	2—Lincoln (W) Roosevelt (W)	
Mount Vernon, N. Y.	1—Proctors	1—Mount Vernon (L)	

136

City	RKO Theatres	Affiliated Theatres	Unaffiliated Theatres
New Rochelle, N. Y.	1—Proctors	1—New Rochelle (L)	
White Plains, N. Y.	1—Keiths	1—State (L)	

137

[1] Based upon Gov. Ex. 126, 163, 432, RKO Ex. 8-A, 11, and Par. Ex. 25.

[2] These theatres were at the time of the trial subject to a local operating agreement which is no longer in effect.

[3] Controlled by Affiliated Theatres, Inc. in which RKO had 10%, Paramount 25% intrest (RKO Ex. 11), but to which RKO did not regularly license features (R. 1616). RKO has sold its interest in this company (Compliance Report, July 1, 1947).

[4] RKO has 50% interest.

C. In cities under 25,000 population

Plaintiff concedes that RKO is not involved in any "consequential situations" in these cities (R. 371). RKO does operate 5 theatres on a first-run policy in 3 cities having populations of less than 25,000: the Orpheum and Virginia theatres in Champaign, Ill., the Reade Theatre in Highland Park, N. J. (in which RKO has a 50% interest) and the Capitol and Strand theatres in Marshalltown, Iowa.

APPENDIX B

COMPETITIVE POSITION OF RKO THEATRES IN NEW YORK CITY

RKO theatre	Seats	Competing theatres within ⅛ mile	Competing theatres within 1 mile	Seats in competing theatres within ⅛ mile	Seats in competing theatres within 1 mile
MANHATTAN					
Alhambra	1,545	11	26	12,376	27,279
Coliseum	3,125	6	8	8,140	12,620
Colonial	1,330	8	37*	7,261	58,436
Hamilton	1,857	4	8	4,921	10,087
Jefferson	1,857	18	36	17,248	35,066
Palace	1,757	Times Square area.			
Regent	1,764	14	34	15,519	32,529
23rd St.	1,831	3	34	1,947	34,885
58th St.	3,163	12	40*	8,098	58,047
81st St.	2,062	6	14	8,900	18,214
86th St.	3,127	8	20	8,490	19,689
125th St.	1,585	10	24	8,650	25,104
BROOKLYN					
Albee	3,272	17	28	32,588	40,525
Bushwick	2,045	11	23	10,956	27,259
Dyker	2,147	2	6	1,656	8,664
Greenpoint	1,667	4	7	3,626	5,325
Kenmore	3,017	7	10	12,202	16,873
Madison	2,771	5	16	4,891	13,968
Orpheum	1,741	15	26	27,617	39,294
Prospect	2,381	5	11	2,908	10,174
Republic	2,691	9	20	6,593	17,779
Shore Road	1,474	2	6	1,656	8,663
Tilyou	2,270	2	5	3,055	6,578

* Excludes 1 RKO theatre within distance.

RKO theatre	Seats	Competing theatres within ¼ mile	Competing theatres within 1 mile	Seats in competing theatres within ¼ mile	Seats in competing theatres within 1 mile
Bronx					
Castle Hill	1,600	1	3	599	4,462
Chester	2,571	4	11	4,618	15,305
Fordham	2,357	11	16	14,975	22,039
Franklin	2,951	6	21	7,143	26,028
Marble Hill	1,649	1	2	599	1,698
Pelham	1,762	0	2	0	2,330
Royal	2,067	6	18	8,101	24,374
Queens					
Alden	1,888	6	9	14,177	16,039
Columbus	1,350	1	2	599	1,399
Flushing	2,929	2	2	3,148	3,148
Midway	1,931	3	6	2,835	5,311
Richmond Hill	2,254	2	11	1,579	14,738
Strand	1,716	1	2	599	1,399

Detail

Manhattan

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist. Mile
Alhambra		1545	.0
	Harlem's Opera House	1532	0.1
	Victoria	2348	0.1
	Apollo	1744	0.1
	Orient	585	0.1
	Sunset	600	0.2
	West End	1100	0.3
	Franklin	560	0.3
	Columbia	600	0.5
	Lincoln	330	0.5
	Jewel	751	0.5
	116th Street	1726	0.5

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
	Morningside	600	0.6
	Regun	867	0.6
	Teatro Hispano	1372	0.6
	Harlem Grand	1432	0.6
	Renaissance	863	0.6
	Triboro	571	0.7
	Reo	588	0.7
	Cosmo	1246	0.8
	Municipal	540	0.8
	Teatro Latino	854	0.8
	Delmar	2250	0.9
	Palace	599	0.9
	Manhattan	900	0.9
	Odeon	863	1.0
	Roosevelt	1358	1.0
Coliseum		3125	.0
	Heights	592	0.1
	Lane	1430	0.1
	Empress	599	0.2
	Gem	575	0.2
	175th Street	3444	0.3
	Uptown	1500	0.5
	Audubon	2607	0.7
	Inwood	1873	1.0
Colonial		1330	.0
	Arcade	542	0.1
	Lincoln	1546	0.15
	Alden	492	0.3
	Filmarte	800	0.4
	Town	1568	0.4
	Little Carnegie Playhouse	460	0.5
	55th St. Playhouse	253	0.5
	Broadway	1600	0.5

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist. Mile
	Beacon	2673	0.6
	Tivoli	1443	0.6
	Winter Garden	1350	0.6
	Hollywood	1587	0.6
	Republic	1225	0.6
	Gotham	922	0.6
	Ambassador	1118	0.7
	World	299	0.7
	Rivoli	2092	0.7
	Capitol	5486	0.7
	Roxy	5886	0.7
	Music Hall	5949	0.75
	77th Street	600	0.8
	Plaza	520	0.8
	48th Street	300	0.8
	Belmont	512	0.8
	Royal	540	0.8
	Palace (RKO 1st run)	(1757)	0.85
	Strand	2720	0.85
	Normandie	590	0.9
	Bijou	600	0.9
	Victoria	811	0.9
	State	3339	0.9
	Astor	1141	0.9
	Criterion	1600	0.9
	Mayfair	1735	0.9
	Globe	1416	0.9
	Squire	558	1.0
	Paramount	3664	1.0
	Miami	499	1.0
Hamilton		1857	.0
	Dorset	692	0.1
	Lido	580	0.1
	Washington	1399	0.2

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.- Mile
	Delmar	2250	0.4
	Costello	599	0.6
	Odeon	863	0.6
	Rio	2346	0.7
	Roosevelt	1358	0.7
Jefferson		1857	.0
	Star	240	0.1
	Arrow	599	0.1
	Comet	556	0.1
	Edison	594	0.1
	Academy	3515	0.1
	Century	1082	0.1
	Irving Place	710	0.1
	City	1855	0.2
	St. Marks	485	0.2
	Orpheum	567	0.3
	Gramercy	540	0.3
	Commodore	2694	0.3
	Art	599	0.4
	Fifth Ave. Playhouse	279	0.4
	Bijou	598	0.5
	Hollywood	1261	0.5
	Lucky Star	475	0.5
	Gramercy Park	599	0.5
	8th St. Playhouse	490	0.6
	National	1800	0.6
	Regent	525	0.6
	Luxor	560	0.7
	Roosevelt	963	0.7
	Avenue B	1738	0.7
	American Movies	579	0.7
	Palestine	1270	0.8
	Waverly	580	0.8
	Sheridan	2304	0.8

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
	Superior	940	0.8
	Delancey	1788	0.9
	Peoples	800	0.9
	Greenwich	590	0.9
	Clinton	1095	0.9
	Hudson Playhouse	597	1.0
	Elgin	600	1.0
	34th Street	599	1.0
Regent		1764	.0
	116th Street	1726	0.1
	Jewel	751	0.1
	Morningside	600	0.1
	Regun	867	0.2
	Teatro Hispano	1372	0.3
	Manhattan	900	0.3
	Teatro Latino	854	0.4
	West End	1100	0.5
	Sunset	600	0.5
	Apollo	1744	0.5
	Victoria	2348	0.5
	Harlem Opera House	1532	0.5
	Municipal	540	0.5
	Orient	585	0.5
	Cosmo	1246	0.7
	Star	2296	0.7
	Madison	530	0.7
	Arden	593	0.7
	Olympia	1294	0.7
	Nemo	950	0.7
	Columbia	600	0.7
	Triboro	571	0.8
	Harlem Grand	1432	0.8
	Park West	598	0.8
	Studio	456	0.8

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
	Edison	599	0.8
	Franklin	560	0.8
	Reo	588	0.9
	Progress	532	0.9
	Carlton	592	0.9
	Midtown	580	0.9
	Palace	599	1.0
	Eagle	1294	1.0
	Rex	1100	1.0
New 23rd Street		1831	.0
	Terrace	597	0.1
	Chelsea	750	0.1
	Elgin	600	0.2
	Greenwich	590	0.6
	Sheridan	2304	0.6
	Savoy	735	0.6
	Fifth Ave. Playhouse	279	0.7
	Gramercy Park	599	0.75
	8th Street	490	0.8
	Arena	800	0.8
	Stanley	621	0.85
	Regent	525	0.9
	Irving Place	710	0.9
	Academy	3515	0.9
	City	1855	0.9
	Hudson Playhouse	597	0.9
	Times	554	0.9
	Anco	572	0.9
	Laffmovie	840	0.9
	Liberty	1155	0.9
	Harris	1024	0.9
	New Amsterdam	1727	0.9
	Bryant	537	0.9
	Pix	850	0.9

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
	Rialto	600	0.95
	Victory	982	0.95
	Lyric	1370	0.95
	Times Square	1056	0.95
	Apollo	1277	0.95
	Selwyn	1012	0.95
	Superior	940	0.95
	New York	600	1.0
	Squire	558	1.0
	Paramount	3664	1.0
58th Street		3163	0.0
	Sutton	569	0.1
	Arcadia	480	0.1
	Clifton	560	0.2
	Plaza	520	0.2
	Normandie	590	0.3
	Lexington	2418	0.3
	Trans-Lux	539	0.3
	Beverly	465	0.3
	York	510	0.4
	Art	598	0.4
	68th St. Playhouse	389	0.4
	Little Carnegie Playhouse	460	0.4
	72d Street	2672	0.6
	Granada	599	0.7
	Monroe	2228	0.7
	42nd Street	1119	0.7
	Filmarte	800	0.7
	Music Hall	5949	0.7
	55th St. Playhouse	253	0.8
	Tudor	601	0.8
	Annex	599	0.8
	State	3339	0.9
	Mayfair	1735	0.9

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
	Palace (RKO 1st run)	(1757)	0.9
	Miami	499	0.9
	Strand	2720	0.9
	Belmont	512	0.9
	Ambassador	1118	0.9
	World	299	0.9
	Rivoli	2092	0.9
	Capitol	5486	0.9
	Roxy	5886	0.9
	Hollywood	1587	0.9
	Winter Garden	1350	0.9
	Republic	1225	0.9
	Gotham	922	0.9
	Broadway	1600	0.9
	Criterion	1600	1.0
	Globe	1416	1.0
	48th Street	300	1.0
	Tivoli	1443	1.0
81st Street		2062	.0
	83rd Street	2634	0.1
	77th Street	600	0.1
	Schuyler	567	0.3
	Beacon	2673	0.3
	Yorktown	953	0.4
	Stoddard	1473	0.5
	Alden	492	0.6
	Symphony	1411	0.7
	Thalia	299	0.7
	Lincoln	1546	0.8
	Arcade	542	0.8
	Jap Gardens	1495	0.8
	Riviera	1694	0.9
	Riverside	1835	0.9

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
86th Street		3127	.0
	Orpheum	2214	0.1
	86th Street	1410	0.1
	Grande	492	0.1
	86th St. Casino	599	0.1
	Translux	588	0.15
	Modern Playhouse	300	0.25
	Park Lane	2001	0.5
	Colony	886	0.5
	Europe	306	0.6
	Photoplay	885	0.6
	Monroe	2228	0.7
	Annex	599	0.7
	Granada	599	0.7
	72nd Street	2672	0.7
	Eagle	1294	0.7
	68th St. Playhouse	389	0.9
	Madison	530	0.9
	Progress	532	0.9
	Art	598	1.0
	Schuyler	567	1.0
125th Street		1585	.0
	Harlem Grand	1432	0.1
	Triboro	571	0.1
	Reo	588	0.2
	Palace	599	0.3
	Cosmo	1246	0.4
	Orient	585	0.4
	Lincoln	830	0.5
	Franklin	560	0.5
	Regun	867	0.5
	Teatro Hispano	1372	0.5
	New Liberty	400	0.6
	Municipal	540	0.6
	Jewel	751	0.6
	116th Street	1726	0.6

RKO Theatre	Competing Theatres	Capacity Seating	Approx. Dist.-Mile
	Victoria	2348	0.6
	Harlem Opera House	1532	0.6
	Apollo	1744	0.7
	Teatro Latino	854	0.7
	Morningside	600	0.8
	Renaissance	863	0.8
	Sunset	600	0.8
	West End	1100	0.8
	Star	2296	0.8
	Rex	1100	0.9
	Brooklyn		
Albee		3272	.0
	Paramount	4156	0.05
	Fox	4060	0.05
	Duffield	890	0.05
	Melba	225	0.15
	Star	1495	0.2
	Metropolitan	3570	0.2
	Subway	580	0.2
	Momart	600	0.2
	Strand	2911	0.2
	New United	1600	0.25
	Majestic	1708	0.3
	Oxford	685	0.35
	Academy of Music	3500	0.35
	Tivoli	1848	0.4
	Towne	485	0.4
	Boro Hall	585	0.4
	Terminal	1660	0.5
	Gold	498	0.6
	Flora	500	0.6
	St. George	978	0.65
	Atlantic	997	0.65
	Lido	515	0.65
	Heights	885	0.7
	Paras Court	593	0.7

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Mile Dist.
	Scott	474	0.75
	Peerless	520	0.8
	Carlton	1383	1.0
	Gloria	594	1.0
Bushwick		2045	.0
	Monroe	592	0.05
	Gates	3011	0.
	Century	800	0.1
	Imperial	440	0.15
	Halsey	2108	0.2
	Empire	1189	0.35
	Marvin	443	0.4
	Eagle	500	0.4
	Decatur	565	0.45
	Bobby	416	0.5
	Grove	892	0.5
	Colonial	2222	0.55
	Comet	598	0.55
	Howard	1373	0.6
	New Casino	1600	0.6
	DeKalb	2600	0.6
	Alhambra	1611	0.7
	Rivoli	900	0.7
	Capitol	1781	0.8
	Mozart	589	0.8
	Parthenon	1499	0.9
	Wyckoff	600	1.0
	Sumner	930	1.0
Dyker		2147	.0
	Harbor	1089	0.3
	Stanley	567	0.5
	Electra	620	0.65
	Alpine	2150	0.8
	Bay Ridge	1905	0.8
	Fortway	2332	1.0

RKO Theatre	Theatres Competing	Seating Capacity	Approx. Dist.- Mile
Greenpoint		1667	.0
	American	556	0.1
	Meserole	1978	0.15
	Nassau	499	0.3
	Midway	593	0.4
	Winthrop	580	0.55
	Vernon	594	1.0
	Idle Hour	525	1.0
Kenmore		3017	.0
	Flatbush	1648	0.1
	Astor	584	0.1
	Albemarle	2656	0.15
	Kings	3609	0.2
	Parkside	600	0.3
	Rialto	1542	0.35
	Granada	1563	0.4
	Patio	2616	0.55
	Linden	1491	0.6
	Venus	564	0.9
Madison		2771	.0
	Parthenon	1499	0.15
	Wyckoff	589	0.3
	Mozart	600	0.3
	Alhambra	1611	0.4
	Grove	592	0.5
	Eagle	500	0.6
	Majestic	550	0.6
	Ridgewood	1966	0.6
	Imperial	599	0.65
	Wagner	550	0.65
	Rivoli	900	0.7
	Grandview	550	0.8
	Willoughby	600	0.85
	Glenwood	1285	0.9

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist. Mile
	Monroe	592	1.0
	Starr	985	1.0
Orpheum		1741	.0
	Strand	2911	0.05
	Momart	600	0.1
	Majestic	1708	0.1
	Academy of Music	3500	0.15
	Paramount	4156	0.15
	Fox	4060	0.2
	Oxford	685	0.25
	New United	1600	0.3
	Melba	2255	0.3
	Subway	580	0.4
	Duffield	890	0.45
	Peerless	520	0.5
	Star	1495	0.5
	Atlantic	997	0.5
	Terminal	1660	0.5
	Metropolitan	3570	0.6
	Towne	485	0.7
	Tivoli	1848	0.7
	Carlton	1363	0.7
	Gold	498	0.8
	Boro Hall	585	0.8
	Plaza	450	0.9
	Flora	500	0.9
	Lido	515	1.0
	Heights	885	1.0
	St. George	978	1.0
Prospect		2381	.0
	Avon	572	0.05
	Globe	904	0.25
	Sixteenth Street	441	0.3
	Minerva	398	0.5
	Garfield	593	0.5

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.- Mile
	Sanders	1535	0.7
	Plaza	450	0.9
	Carlton	1383	0.9
	Gloria	594	0.9
	Clinton	644	0.9
	Terminal	660	1.0
Republic		2691	.0
	Nassau	460	0.15
	Commodore	1419	0.25
	Marcy	716	0.25
	Williamsburg	600	0.25
	Square	388	0.3
	Metro	930	0.4
	Wilson	966	0.45
	Graham	575	0.5
	Model	539	0.5
	Rainbow	1746	0.55
	Lindy	600	0.6
	Sun	772	0.65
	Grand	600	0.65
	Grace	421	0.8
	Folly	1750	0.85
	Echo	560	0.9
	Winthrop	580	0.9
	Nassau	499	0.9
	Meserole	1978	1.0
	Alba	1680	1.0
Shore Road		1474	.0
	Harbor	1089	0.3
	Stanley	567	0.5
	Electra	620	0.6
	Bay Ridge	1905	0.75
	Alpine	2150	0.8
	Fortway	2332	1.0

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
Tilyou		2270	.0
	Coney Island	2500	0.2
	Mermaid	555	0.5
	Surf	1277	0.7
	Tuxedo	1800	0.95
	Lakeland	446	1.0
	Bronx		
Castle Hill		1600	.0
	Circle	599	0.5
	American	1998	0.6
	Square	585	0.7
	Rosedale	1280	0.85
Chester		2571	.0
	Elsmere	1542	0.2
	Vogue	1392	0.2
	Ritz	1085	0.25
	Dover	599	0.35
	Fairmount	2504	0.6
	DeLuxe	1400	0.75
	Radio	550	0.9
	Ward	1831	0.9
	Freeman	1604	1.00
	Parkway	1700	1.00
	Dark	1098	1.00
Fordham		2357	.0
	Concourse	587	0.05
	Valentine	1224	0.1
	Windsor	1600	0.15
	Paradise	3840	0.2
	Lido	599	0.25
	Grand	2472	0.25
	Kingsbridge	1099	0.35
	Ascot	599	0.4
	University	575	0.4

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist. Mile
	Decatur	900	0.5
	Metro	1450	0.5
	Oxford	1926	0.6
	Savoy	1000	0.75
	Avalon	1440	0.95
	Kameo	550	0.95
	Burnside	2178	1.00
Franklin		2951	.0
	Empire	1744	0.05
	Prospect	1423	0.1
	Burland	1817	0.1
	President	975	0.2
	Jackson	590	0.4
	Tiffany	594	0.4
	Star	599	0.55
	Tower	1693	0.6
	Art	599	0.65
	Ace	1099	0.7
	Victory	1712	0.7
	Boro	599	0.8
	McKinley	1200	0.8
	Freeman	1604	0.85
	Radio	550	0.9
	Rex	600	0.9
	Blenheim	1862	1.00
	Bronx	1457	1.00
	National	2333	1.00
	Boston Road	1578	1.05
	Central	1400	1.05
Marble Hill		1649	.0
	Dale	599	0.05
	Kingsbridge	1099	1.00

RKO Theatre	Competing Theatres	Seating Capacity	Approx. Dist.-Mile
Pelham		1762	.0
	Park	1098	0.7
	Allerton	1232	0.9
Royal		2067	.0
	Rex	600	0.05
	Bronx	1457	0.1
	Central	1400	0.1
	National	2333	0.1
	Victory	1712	0.25
	Boro	599	0.35
	Jackson	590	0.6
	Casino	2210	0.7
	Forum	2320	0.75
	Osceola	566	0.75
	Heaven	562	0.75
	President	975	0.75
	Ace	1099	0.8
	Prospect	1423	0.85
	Empire	1744	0.9
	Fleetwood	1699	0.95
	Earl	1268	1.00
	Burland	1817	1.00
	Queens		
Alden		1888	.0
	Mesrick	2566	0.1
	Valencia	3544	0.1
	Jamaica	1677	0.2
	Savoy	1750	0.3
	Carlton	1973	0.35
	Hillside	2607	0.5
	Plaza	600	0.55
	Linden	820	0.9
	Hollis	502	1.0

RKO Theatre	Theatres Competing	Seating Capacity	Approx. Dist.- Mile
Columbia		1350	.0
	Gem	599	0.1
	Eldgemere	590-800 open air	0.65
Flushing		2929	.0
	Town	899	0.15
	Prospect	2249	0.3
Midway		1931	.0
	Kew Gardens	1287	0.45
	Forest Hills	949	0.5
	Trylon	599	0.5
	Inwood	1278	0.55
	Austin	599	0.7
	Main St. Playhouse	599	0.8
Richmond Hill		2254	.0
	Steinway	980	0.15
	Austin	599	0.45
	Jerome	872	0.6
	Willard	2300	0.6
	Kew Gardens (cl)	1287	0.7
	Inwood	1278	0.7
	Casino	901	0.8
	Lefferts	1613	0.8
	Roosevelt	1379	0.9
	Hillside	2607	0.9
	Ace	922	1.0
Strand		1716	.0
	Gem	599	0.1
	Edgemere	590-800 open air	0.75

APPENDIX C

RKO's Total Income, Net Income After Taxes, and Percent of Net to Total Income, 1929-1944

(From RKO Exhibit 26)

Year	Total Income (a)	Net Income or Loss After Taxes (b)	Percentage of Net Income or Loss to Total Income
1929	$53,261,719.50	$2,523,558.59	4.7380%
1930	72,976,264.38	4,173,210.16	5.7186
1931	80,445,488.13	*5,199,397.44*	*6.4631*
1932	61,078,722.94	*10,695,503.20*	*17.5110*
1933	45,040,791.85	*4,384,064.09*	*9.7335*
1934	42,533,027.59	*310,574.67*	*.7302*
1935	45,959,717.76	684,732.96	1.4899
1936	49,933,655.48	2,485,911.03	4.9784
1937	53,711,261.67	1,821,165.98	3.3907
1938	57,336,806.67	18,604.43	.0324
1939	52,194,963.99	*228,608.38*	*.4380*
1940	55,026,431.85	*695,416.30*	*1.2638*
1941	54,091,381.24	591,467.04	1.0935
1942	62,057,961.17	788,786.88	1.2710
1943	79,736,241.79	7,015,420.21	8.7983
1944	86,049,805.93	5,228,694.01	6.0764
Total	$951,434,241.94	$3,818,087.31	.4013%

[Figures in Italics are red figures]

Notes:

(a) The above figures are those appearing on the books of the companies and include income from miscellaneous sources shown under the caption "Other Income" on the annual operating statements.

(b) Before deduction of dividends paid on capital stocks of subsidiary companies in the hands of the public.

APPENDIX D

Record as to the 35 Cities of Over 100,000 Population in Which RKO Licensed Product First-Run to Affiliated Theatres (1943-44).

(Initials in parentheses indicate company with which theatre was affiliated.)

1. *Oakland, Cal.*

RKO licensed 36 features to Fox, Paramount, and Orpheum theatres (F) (Ex. 95). Their seating capacities are 3,335, 3,434, and 2,561, respectively (R. 2132b; *Cf.* R. 759-60). These theatres are "the superior houses of the city" and have "excellent locations in downtown Oakland" (R. 2132b). They are better operated and give greater playing time on good pictures (R. 478, 480). The Fox is one of the finest theatres in the country and the Paramount is among the best. (*Ibid.*)

Three unaffiliated theatres, T&D, Esquire, and Roxy operate first-run (R. 477-80). The T&D, seating capacity, 2,760, is the largest (R. 2132c; RKO Ex. 28). It is older, not so well equipped, and is a few blocks out of the better downtown amusement section (R. 2132c). The other two theatres have seating capacities of only 1,075 and 1,300 (R. 759-60). These theatres cannot compete from the standpoint of gross with either the Fox or Paramount (R. 760), though Columbia gets satisfactory revenues and playing time from them (R. 1291-2). RKO licensed 3 features for first-run exhibition in the Roxy during the 1943-44 season (Ex. 95), and apparently these theatres

obtain part of United Artists' and substantially all of Universal's product (Ex. 428 and 428a).

2. *Sacramento, Cal.*

RKO licensed 35 features for exhibition in the Capitol, Senator and Hippodrome Theatres (Ex. 95). Fox has a minority interest in these theatres (RKO Ex. 11). Their seating capacities are 1,178, 2,105, and 1,7[illegible], respectively (RKO Ex. 11). The Senator is the finest theatre in the Sacramento Valley (R. 2132f). The Senator, Capitol, and Fox's Alhambra are the best theatres in the city (R. 761). Loew's considers Fox the most desirable outlet and "by far the best operation" (R. 489). The Hippodrome is now operated as second-run (R. 2132f).

The only unaffiliated theatres operating first run are the Esquire and the Times Theatres with seating capacities of 998 and 500 respectively and the new neighborhood Tower with 1,100 seats (*Ibid.*). Apparently the Tower was not open during the 1943-44 season, for RKO licensed three features for exhibition in only the downtown theatres (Ex. 95). These theatres showed on first-run product of Columbia, Universal, PRC, and one-half Warner's (R. 2132f). There is no evidence that these theatres are comparable in location, physical condition, or earning power with the Fox theatres.

3. *San Diego, Cal.*

RKO licensed 37 features for exhibition in the following theatres: Fox (F) 2878 seats, California (F) 2027, State (F) 1012, Adams (F) 684, and Orpheum (F) 1952 (Ex. 95; R. 2130-31; RKO Ex. 11). The Fox theatre is one of the largest and finest on the Pacific Coast, the California,

Orpheum and State are de luxe theatres, and the Adams has excellent appointments (R. 2131). These theatres are by far the best in the city (R. 490).

Metzger operates three unaffiliated theatres on first-run, Spreckles 1800 seats, Broadway 800, and Tower 600, one of which plays continued first-run or moveovers (R. 2130-31). The Spreckles is the largest unaffiliated theatre (RKO Ex. 28). The Metzger theatres are in good condition (R. 2131). They show product of Universal, Columbia, and part of Warner (Exs. 428 and 428a).

4. *Bridgeport, Conn.*

RKO licensed 20 features for exhibition in Poli (L) 3,641 seats; Majestic (L) 2,240; and Lyric (L) 2,166. RKO licensed 17 features for exhibition in Warner (W) 1,332; and Merritt (W) 997 (Exs. 95 and 95a; RKO Ex. 11). The Merritt Theatre apparently plays RKO's highest grossing features day-and-date with the Warner (Ex. 94).

There is no evidence respecting appointments, location or general characteristics of any unaffiliated theatres in this city. The largest is the Park City, 1,090 seats (RKO Ex. 28).

5. *Hartford, Conn.*

RKO licensed 20 features for exhibition in Regal (W) and Strand (W) and 18 features in Poli (L) and Palace (L) (Ex. 95). Paramount has an interest in the Allyn which plays all of its product on first run policy (R. 846-7; Ex. 428).

The unaffiliated Dow's, State, and E. M. Loew operate on first run (R. 465), one or more of them probably using product of Universal and Columbia (Ex. 428). While the

State and E. M. Loew are comparable in seating capacity to three of the four affiliated theatres playing RKO product (RKO Ex. 28), there is no evidence that they are comparable in location, appointments or operating efficiency.

6. *New Haven, Conn.*

RKO licensed 20 features to the Poli (L), 3007 seats, and Bijou (L), 1499, and 17 features to the Rodger Sherman (W), 2060 (Ex. 95; RKO Ex. 28). In addition, Paramount is interested in the Paramount with 2348 seats, which plays its product on first run (R. 847; Exs. 428 and 428a).

There are 2 unaffiliated theatres comparable in seating capacity to the smallest affiliated theatre which licensed RKO product (RKO Ex. 28), but there is no evidence that they or any other unaffiliated theatre are comparable in other important respects.

7. *Wilmington, Del.*

RKO licensed 38 features to the Queen (W) 1449 seats, Warner (W) 1761, Ritz (W) 1024, and Grand Opera (W) 1322 (Ex. 95; RKO Exs. 11 and 28). Apparently the Ritz does not operate on regular first run (R. 498; R. 762). In addition, the Aldine (L) operates on first run (R. 498).

The largest unaffiliated theatre is the Edgemoor, 850 seats, but Blair's Rialto is the only one operating on first run (*Ibid.*). Fox licenses exclusively to the Rialto which gives long runs (R. 1142). However, Kupper conceded that the Warner theatre could throw off greater revenue (*Ibid*). Fox consumes all of the Rialto's playing time (*Ibid.*), so

RKO could not have licensed any part of its product to that theatre.

8. *Jacksonville, Fla.*

RKO licensed 35 features to Florida (P) 2185 seats, Palace (P) 1314, Arcade (P) 1115, and Temple (P) 889 which operates on a first run policy (Ex. 95; R. 466, 847). These theatres are "most superior", the largest and best in the city (R. 466, 847).

The largest unaffiliated theatre is the St. Johns with 815 seats (R. 847; RKO Ex. 28). It operates on first run. RKO licensed 2 features for exhibition in the St. Johns, but there is no evidence that this theatre is comparable to the affiliated theatres or that it could pay satisfactory rentals for most RKO features.

9. *Miami, Fla.*

RKO licensed 37 features for exhibition in the Olympia (P) 2125 seats and Paramount (P) 1134 and 4 other theatres affiliated with Paramount which are presently on a subsequent run policy (Ex. 95; R. 848). These theatres are better than any others (*Ibid.*; R. 471).

Wometco's unaffiliated Capitol with 1234 seats and Miami 472 compete with the affiliated theatres (*Ibid.*). Apparently Fox, United Artists, Universal, and Columbia license the Wometco houses first run (Exs. 428 and 428a), so they have ample product. RKO licensed one feature to Wometco's Ritz for first run exhibition (Ex. 95).

10. *Tampa, Fla.*

RKO licensed 36 features to the Tampa (P) 1554 seats, Park (P) 1281, Strand (P) 742, and Florida (P) 901 (Ex. 95; R. 495).

The only unaffiliated theatres operating on first run are the State with 604 seats and the Lincoln 800, the latter catering to colored patrons (R. 848). The affiliated theatres are much larger and better than the State (*Ibid.*). The State apparently uses all of Warner's product (Exs. 428 and 428a), which, in view of its size, probably exhausts its playing time. RKO licensed one feature for exhibition in the State (Ex. 95).

11. *Atlanta, Ga.*

RKO licensed 32 features for exhibition in Fox (P), 4500 seats, Paramount (P) 2476, and Capitol (P) 2100, and 3 other theatres affiliated with Paramount (Ex. 95; R. 849). The Grand (L), 1850 seats, operates in competition (*Ibid.*). In addition, Murray's unaffiliated Rialto and, perhaps, one or two unidentified unaffiliated theatres operate on a first run policy (*Ibid.*) (*Cf.* R. 451).

RKO licensed two features to the Rialto (Ex. 95) and regularly licenses all of its Goldwyn pictures to that theatre (R. 1698). The Rialto has only 700 to 800 seats, plays each Goldwyn picture for five or six weeks, and pays a better rental than the theatres affiliated with Paramount (*Ibid.*). However, it plays all of Columbia's product and could not take 25 or 30 RKO features and, perhaps, not even 1 or 2 more (*Ibid.*).

12. *Peoria, Ill.*

RKO licensed 38 features to the Madison (P) 1797 seats, Palace (P) 1816, and Rialto (P) 1560 (Ex. 95; R. 850).

The largest unaffiliated theatres have capacities of only 750 seats (RKO Ex. 28). The affiliated theatres are the best in Peoria (R. 850).

13. *South Bend, Ind.*

RKO licensed substantially all features for exhibition in the Colfax (P), Palace (P) and Granada (P) theatres (Ex. 95). Their seating capacities are, respectively, 2069, 2977, and 2387 (R. 851).

The largest unaffiliated theatre has only 800 seats (RKO Ex. 28). The Paramount theatres are the best in the city (R. 851) and no other theatres "by their quality, location or equipment, would be entitled to first-run" (R. 493).

14. *Wichita, Kansas*

RKO licensed 37 features for exhibition in the Miller (F), Orpheum (F), Palace (F), and Wichita (F) Theatres (Ex. 95). These have seating capacities of 1930, 1659, 1234, and 906 respectively (R. 2067). The Boulevard (F), 972 seats, runs day-and-date with the Orpheum or Miller. The Sandra (F), 640 seats, is a moveover theatre (*Ibid.*). These theatres are the most suitable for first run exhibition (R. 2068).

The largest unaffiliated theatre is the Civic, with 900 seats (RKO Ex. 28). RKO licensed one feature to the Civic for first run exhibition (Ex. 95), but there is no evidence that it or any other unaffiliated theatre would serve as a regular and satisfactory outlet for first run of RKO product.

15. *Somerville, Mass.*

RKO licensed 29 features to the Capitol (P) and Ball Square (P) Theatres (Ex. 95). Their seating capacities are 1735 and 1248 respectively (R. 854). They are much larger and better than unaffiliated theatres (*Ibid.*; R. 493).

The remaining theatres operating on a first run policy are Viano's Broadway, Teele Square, and Somerville (R. 492-3). The largest is the Somerville, with 1100 seats (RKO Ex. 28). Apparently they regularly play Columbia's product on first run (Ex. 428). During the 1943-44 season, RKO licensed 3 features for first run in Viano's theatres and 5 features to Peterson's Orpheum (Ex. 95). There is no evidence that they, or any other unaffiliated theatres, are comparable to the Paramount theatres as first run outlets for RKO product.

16. *Springfield, Mass.*

RKO licensed 19 features for exhibition in the Paramount (P) and Broadway (P), (Ex. 95). Their seating capacities are 2758 and 1765 respectively (R. 854). According to a Paramount witness, the Paramount Theatre is the largest, has the best appointments, has as good location as any theatre, and is the best in the city (*Ibid.*).

RKO licensed 1 feature for exhibition in the Palace (L), (Ex. 95). According to a Loew witness, the Palace is by far the best theatre in the city (R. 494).

RKO licensed 17 features for exhibition in the Capitol (W) and Art (W) Theatres (Ex. 95). Their seating capacities are 1777 and 936 respectively (RKO Ex. 28). Apparently, the Art is used as a moveover house (Ex. 94).

The only identified unaffiliated theatre playing on run is Ander's Bijou, with a seating capacity of less than 1000 (R. 493-4; RKO Ex. 28). This theatre apparently plays the product of Columbia and part of Universal (Ex. 428). The largest unaffiliated theatres are comparable in size only to the Art (W) (RKO Ex. 28).* There is no evidence

* RKO Ex. 28 erroneously lists the Art (W) as an unaffiliated theatre.

that the Bijou, or any other unaffiliated theatre, is comparable to any of the affiliated theatres in terms of quality, appointments, operating efficiency, or location.

17. *Worcester, Mass.*

RKO licensed 16 features for exhibition in the Warner (W) Theatre (Ex. 95), which has a seating capacity of 1290 (RKO Ex. 11).

RKO licensed 11 features to the Poli (L) Theatre (Ex. 95), the largest in the city with 3239 seats (RKO Exs. 11 and 28).

RKO licensed 7 features for exhibition in the Capitol Theatre (P), 884 seats (Ex. 95; R. 855). The Capitol is not as large as the Poli (L) and Elm St. (L), but is comparable in appointments and has a better location than any other theatre playing first run (R. 855).

E. M. Loew's Plymouth Theatre is the only unaffiliated theatre comparable in size to any affiliated houses operating on a first run policy (RKO Ex. 28). RKO licensed three of its features for exhibition in this theatre. However, there is no evidence that it or any other unaffiliated theatre is comparable in location, physical condition, or operating efficiency to any of the affiliated theatres.

18. *Detroit, Mich.*

RKO licensed 37 features for exhibitions in the Palms-State (P), Michigan (P), United Artists (P) and Broadway Capitol (P) theatres (Ex. 95), with seating capacities of 2967, 4029, 2018 and 3367, respectively (R. 855). Together with the Fox (F) and Adams, they are the best theatres in the city (R. 461).

The Fox (F) theatre, 5041 seats, is the largest and finest in the city. Fox has a minority interest in the Adams, 1545 seats, which exhibits the pictures of the same distributors who license the Fox Theatre (R. 2134).

RKO licensed one feature for first showing in the unaffiliated Paradise. However, there is no evidence that any unaffiliated theatre is comparable in any respect with the affiliated theatres mentioned above.

19. *Elizabeth, N. J.*

RKO licensed 33 features for exhibition in the Regent (W), Ritz (W) and Liberty (W) Theatres (Ex. 95) with seating capacities of 2495, 2791, and 1692, respectively (RKO Ex. 11).

RKO licensed three features for first showing in the unaffiliated State and Strand theatres (Ex. 95). However, there is no evidence that these or any other unaffiliated theatres are comparable in location or facilities with any of the above named theatres.

20. *Paterson, N. J.*

RKO licensed 35 features to the Fabian (W), Garden (W) and Rivoli (W) Theatres (Ex. 95) with 3263, 1193 and 1623 seats respectively (RKO Ex. 11).

The only other theatre in the city operating first run is the United States (P), with 1487 seats (R. 481-2, 859). It is comparable in quality and location with the above theatres (R. 859).

The largest unaffiliated theatre is the State, with 1000 seats (RKO Ex. 28). RKO licensed two features to the unaffiliated Majestic for first run (Ex. 95). However, there is no evidence that the State, Majestic, or any other un-

affiliated theatre is comparable with the above theatres as a regular first run outlet for RKO product.

21. *Utica, N. Y.*

RKO licensed 38 features for exhibition in the Avon (W) and Stanley (W) Theatres (Ex. 95), with seating capacities of 1562 and 2959 respectively (RKO Ex. 28). Both operate on a regular first run (R. 497).

The largest unaffiliated theatre in Utica is Gordon's Olympic, 1500 seats (RKO Ex. 28). This theatre operates on first run (R. 497) using product of Fox and apparently Columbia (R. 1131; Ex. 428). Loew's witness testified that the Avon and Stanley are superior in every way (R. 497). Fox transferred its product to the Olympic after a disagreement (R. 1131), but there is no evidence that it is comparable to the Avon and Stanley as a first run outlet.

22. *Charlotte, N. C.*

RKO licensed 38 features to the Carolina (P), Imperial (P), Broadway (P) and State (P) theatres (Ex. 95) with seating capacities of 1450, 946, 1103 and 645 respectively (R. 862).

The largest unaffiliated theatre has only 500 seats (RKO Ex. 28). The four theatres which license RKO product are the best in the city and there are no others comparable to them (R. 862).

23. *Portland, Oregon*

RKO licensed 38 features for exhibition in the Paramount (F), Orpheum (F) and Mayfair (F) Theatres

(Exs. 95 and 95a). The Paramount, 3054 seats, built in 1928, has always shown first run product (R. 2027). The Orpheum, 1732 seats, built in 1912, before Fox acquired its interest, consistently has operated first run (R. 2028). The Mayfair, 1498 seats, operates on a moveover policy, and was re-equipped in 1943 (R. 2026, 2028).

The J. J. Parker interests operate the unaffiliated Broadway and United Artists theatres first (R. 485). Unaffiliated exhibitors license the product of Loew's, United Artists, Universal and one-half of Warner for first run exhibition, and charge the same admission prices as affiliated first run theatres (R. 2039). There is no evidence that any unaffiliated theatres are comparable to the affiliated theatres. In any event, the Parker theatres are well supplied with first run product and there is no evidence that they or others could use RKO product.

24. *Erie, Pa.*

RKO licensed 38 features to the Warner (W) and Columbia (W) theatres (Ex. 95) with seating capacities of 2584 and 961 respectively (RKO Ex. 28). The Warner is the largest and best theatre in the city (R. 756) and plays RKO's best pictures (Ex. 94).

The largest unaffiliated theatre operating on first run is the Shea, seating 1189 (R. 462; RKO Ex. 28). Apparently the Shea plays the product of Fox, United Artists, Universal, Columbia, and part of Loew (Ex. 428).

25. *Philadelphia, Pa.*

RKO licensed 38 features for exhibition in ten theatres affiliated with Warner (Ex. 95).

The only unaffiliated theatres operating on first run in Philadelphia are Goldberg's Studio, which is very small, and Goldman's Erlanger with 1800 seats (R. 482-3). The Erlanger is "badly off location" (R. 484). There is no evidence that any unaffiliated theatre is comparable to the Warner houses as first run outlets for RKO's product. Warner's lease on the Fox (F) expired on October 5, 1945, and it is now operated as the first run outlet for Fox product in competition with the Warner theatres (R. 2135).

26. *Scranton, Pa.*

RKO licensed 36 features for exhibition in the Strand (P), Comerford (P), Capitol (P) and State (P) theatres (Ex. 95), seating capacities 1542, 1600, 1770 and 920 respectively (R. 863). They are the best theatres in Scranton (R. 863).

The largest unaffiliated theatre is the Orient with 720 seats (RKO Ex. 28). RKO licensed one feature for first run in the Bullshead and one in the Favini theatre (Ex. 95). However, there is no evidence that these or any other unaffiliated theatre could serve as a regular and satisfactory first run outlet for RKO product.

27. *Chattanooga, Tenn.*

RKO licensed 32 features to the Tivoli (P), State (P) and Rialto (P) (Ex. 95), with seating capacities of 1781, 856 and 800 respectively (R. 864). These are by far the best theatres in Chattanooga (*Ibid.*). The Tivoli was built in 1920, approximate cost $500,000, and was remodeled and refurnished at a cost of $30,000 in 1939. It has air-conditioning, and is "an outstanding theatre and the pride of Chattanooga" (Par. Ex. P-25, p. 6). The State was

built in 1928 at a cost of $100,000 and was refurnished at a cost of $20,000 in 1938; next to the Tivoli, it is considered the best theatre (*Ibid.*).

RKO licensed two features for first exhibition in the American and Capitol theatres (Gov. Ex. 95). The Capitol, with 550 seats, is the best unaffiliated theatre (Par. Ex. P-25, pp. 1, 6). It was built in 1937 as a broadcasting studio but converted in 1940; it is a make-shift arrangement but produced a fair theatre at a cost in the neighborhood of $25,000 (*Ibid.*).

28. *Knoxville, Tenn.*

RKO licensed 37 features for exhibition in the Tennessee (P), Riviera (P) and Strand (P) theatres (Ex. 95a) with seating capacities of 1996, 1012, and 799 respectively (R. 864). The Tennessee is an $800,000 theatre and was opened in 1928; it is air conditioned and is known as the "showplace of East Tennessee" (Par. Ex. P-25, p. 7). The Riviera has an excellent location, is in fine physical condition, and is regarded as the city's second best theatre (*Ibid.*). These theatres are by far the best in the city and there are no others which are adaptable to first run (R. 468, 1864).

The best unaffiliated theatre is the Roxy, 800 seats (P-25, pp. 1, 7). It has an inferior location, is not attractive and has never been well maintained (*Ibid.*). There is no evidence that any other unaffiliated theatre is comparable in appointments, operating efficiency or location with the affiliated theatres.

29. *Memphis, Tenn.*

RKO licensed 18 features for exhibition in the State (L) and Palace (L) theatres (Ex. 95) with seating capacities of 2550 and 2154 respectively (RKO Ex. 11). They are the best theatres in the city (R. 471).

RKO licensed 12 features for exhibition in the Strand (P), 1086 seats (Ex. 95; RKO Ex. 11).

RKO licensed four features for exhibition in the Warner (W), 1982 seats (Ex. 95; RKO Ex. 11).

RKO licensed one feature each for showing in the Airways (900 seats) and Luciann (1014 seats) theatres, and two features to the Lamar (1000 seats) (Seating capacities: RKO Ex. 27). There are several unaffiliated theatres in Memphis comparable in size to the Strand, the smallest of the affiliated theatres (See RKO Ex. 27). However, "So This Is Washington," a low-grossing picture, was the only picture of the 1943-44 first block which was exhibited in the Strand (Exs. 93-94). This indicates that it plays some of RKO's lower-grossing features.

There is no evidence that any unaffiliated theatre is comparable in appointments, operating efficiency or location with the other affiliated theatres mentioned above, or could use RKO's product on first run and pay satisfactory rentals therefor.

30. *Dallas, Texas*

RKO licensed 35 features for exhibition in the Majestic (P), Palace (P), Capitol (P), Rialto (P), Melba (P), and Village (P) theatres (Ex. 95a). The Village, with 1309 seats, apparently operates in a suburb (RKO Ex. 11). The Majestic has 2415 seats, the Palace 2332, the Capitol 1052,

the Rialto 1332 and the Melba 1841 (R. 864-65). The above theatres are the largest and best in Dallas (*Ibid.*).

The largest unaffiliated theatre is the Arcadia with 1042 seats (RKO Ex. 28). RKO licensed one feature to the Arcadia and two features to the Queen (Ex. 95), but there is no evidence that these theatres or any other unaffiliated theatre could serve as a regular and satisfactory first run outlet for RKO product in Dallas.

31. *Fort Worth, Texas*

RKO licensed 35 features for exhibition in the Worth (P), Hollywood (P), Palace (P) and Parkway (P) theatres (Ex. 95). The seating capacities of the first three of these theatres are 2358, 1700 and 1468 respectively (R. 865). Parkway, 1021 seats (RKO Ex. 11), apparently operates on a subsequent run policy (R. 464, 865). These theatres are by far the largest and best in Fort Worth (R. 865).

The only unaffiliated theatre comparable in size is the Liberty (RKO Ex. 28; but see R. 865). RKO licensed four features for first showing in the Holton and one in the White (Ex. 95), but there is no evidence in the record that any unaffiliated theatre could serve as a regular and satisfactory first run outlet for RKO's product.

32. *San Antonio, Texas*

RKO licensed 37 features for exhibition in the Majestic (P), Empire (P), Prince (P), Aztec (P) and State (P) theatres (Ex. 95a). The Majestic, with 3703 seats, the Aztec, with 2433, the Empire, with 1497, and the Texas (P), with 2752 are presently operated on a first run policy (R.

866; *cf.* R. 489). These theatres are by far the best in San Antonio (R. 866).

There are 8 unaffiliated subsequent run theatres in the city (*Ibid.*). RKO licensed one feature for first showing in Lucchese's Zaragoza (Ex. 95). There is no evidence that any unaffiliated theatre is comparable to the affiliated theatres in location, size, or appointments.

33. *Seattle, Washington*

RKO licensed 37 features for exhibition in the Fifth Avenue (F), Blue Mouse (F), Paramount (F), Music Hall (F) and Orpheum (F) theatres, and one feature to the Palomar in which Fox is interested (Ex. 95). All of these operate on first run, except the Blue Mouse, which plays moveovers (R. 2017). The Fifth Avenue, with 2366 seats, was built in 1926 and is one of the outstanding theatres in Seattle (R. 2018). The Blue Mouse, with 851 seats, was built in 1920 by an independent exhibitor, and has always played first run or moveover (R. 2019). The Paramount, with 3049 seats, is the largest theatre in Seattle and was built in 1928 to show pictures on first run (R. 2018). The Music Hall, with 2282 seats, was built about 1927 by an independent exhibitor and has always operated on a first run or moveover policy (R. 2018-19). The Palomar, with 1437 seats, was built around 1915 and from about 1938 has played first run product with stage shows (R. 2019). All of these theatres are centrally located in the downtown district and in the main theatre section (*Ibid.*). Reagan stated that it improves Paramount's revenue to play a picture in as fine a theatre as the Fifth Avenue in Seattle because of the advertising and publicity value of the theatre (R. 769-770). Rodgers regards these theatres as far superior to unaffiliated operations (R. 492).

The only unaffiliated theatre playing first run is the Liberty, 1650 seats. There is also a newsreel house (R. 2019). The Liberty is poorly located, plays first run the product of Columbia, one-half of United Artists, and the product of certain non-defendant producers (R. 2019-20). There is no evidence that the Liberty or any other unaffiliated theatre could serve as a satisfactory first run outlet for RKO product. There is no evidence that the Liberty is not supplied with all the product it needs.

34. *Spokane, Wash.*

RKO licensed 38 features for exhibition in the Fox (F), Orpheum (F) and State (F) theatres (Ex. 95). The seating capacity of the Fox is 2251. It was built in 1931 and is the largest and best theatre in the city (R. 2022-24). The Orpheum has 1272 seats and was built in 1918 (*Ibid.*). The State, with 954 seats, was built in 1916, has always played first run irrespective of ownership, and is larger than any unaffiliated theatre (*Ibid.*; but see RKO Ex. 28).

The only unaffiliated theatre operating on a first run policy is the Granada with 550 seats (R. 493, 2022-4). The Granada was built in 1912 and it began to operate on a first run policy in 1942 when it acquired the product of Universal, part of Republic and part of Columbia (R. 2022-4). The revenue possibilities of the Granada are not equal to the Fox (R. 537). There are no other unaffiliated theatres which by their quality, character and location could serve as a satisfactory first run outlet (R. 493).

35. *Milwaukee, Wis.*

RKO licensed 17 features for exhibition in the Warner (W) theatre and 19 features for exhibition in the Alhambra

(W) and Riverside (W) theatres (Ex. 95). The theatres in Milwaukee which operate on first run are, the Wisconsin (F) 2778 seats, Palace (F) 2438, Strand (F) 1200 (moveover), Warner (W) 2000, Riverside (W) 2300, and Alhambra (W) 1400 (moveover) (R. 1987).

The Warner and Wisconsin theatres are showcases and the best in the area betwen Chicago and Minneapolis (*Ibid.*). The Palace and Riverside are fine, luxurious theatres (*Ibid.*).

The affiliated theatres which operate first run are substantially larger than any unaffiliated theatre (RKO Ex. 28). One of the larger unaffiliated theatres, the Avalon, 1200 seats, is a first run neighborhood theatre (R. 1992). RKO licensed one feature for first showing in the Colonial theatre (Ex. 95), but there is no evidence that the Colonial or any other unaffiliated theatre could serve as a regular satisfactory first run outlet for RKO product in this city.

APPENDIX E

RECORD AS TO THE 187 CITIES OF 25,000 TO 100,000 POPULATION IN WHICH RKO LICENCED PRODUCT FIRST-RUN TO THEATRES NOT AFFILIATED WITH RKO BUT AFFILIATED WITH DEFENDANTS OTHER THAN RKO (1943-44)*

A. RKO product was exhibited first run in theatres in which other defendants have minority interests in 20 cities

In 14 of these cities the theatres in which RKO exhibited (Ex. 94) were those in which Paramount had a minority interest (RKO Ex. 11). The individual superiority of the theatres in these 14 cities is concisely summarized in Exs. P-25 and P-25A, at the pages indicated:

City	Exs. P-25 and P-25-A
1. Quincy, Ill.	pp. 77-79
2. Rockford, Ill.	81-83
3. Clinton, Iowa	103-104
4. Mason City, Iowa	108-109
5. Baton Rouge, La.	119-120
6. Shreveport, La.	125-126
7. Bangor, Me.	128-129
8. Jackson Miss.	200-201
9. Concord, N. H.	340
10. Wilmington, N. C.	231
11. Lebanon, Pa.	251-252
12. Danville, Va.	312
13. Burlington, Vt. (The unaffiliated Strong theatre played "Rookie" and "Lady" on first run.)	342
14. Fitchburg, Mass. (The unaffiliated Shea's played 4 of First Block first run.)	338

* For this Appendix, RKO has used the test of affiliation urged by the plaintiff, i.e., theatres in which a defendant has any interest, however small.

In the remaining 6 cities the Record either fails to show the existence of unaffiliated theatres herein or shows that they played part of RKO's first block:

15. Alhambra, Cal.
16. Ottumwa, Iowa
17. Waltham, Mass.
18. Aliquippa, Pa.
19. Everett, Wash.
20. Allentown, Pa.

B. RKO product was exhibited first run in theatres affiliated with other defendants in 19 cities where Record does not show existence of any unaffiliated theatre

1. Tuscaloosa, Ala.
2. Norwalk, Conn.
3. West Hartford, Conn.
4. Elgin, Ill.
5. Owensboro, Ky.
6. Newton, Mass.
7. Rochester, Minn.
8. Belleville, N. J.
9. Hackensack, N. J.
10. Kearny, N. J.[1]
11. Montclair, N. J.
12. Jamestown, N. Y.
13. Eau Claire, Wis.
14. Fond du Lac, Wis.
15. Beaumont, Tex. (except 1 Negro theatre)
16. Wilkensburg, Pa.
17. West Palm Beach, Fla.[2]
18. Santa Barbara, Cal.[3]
19. Bakersfield, Cal.

There can be no showing of "discrimination" where the Record does not show there is an alternative unaffiliated exhibitor.

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[1] The Regent Theatre in Kearny, which played three of the four RKO first block exhibited in that city, is leased by RKO to a non-defendant. However, the Government classifies it as affiliated with Warner.

[2] R. 364; RKO Ex. 28.

[3] R. 2132-o. Cf. RKO Ex. 28.

C. RKO product was exhibited first run in part in theatres affiliated with other defendants, in part in unaffiliated theatres in 35 cities

Except in 13 instances, the Record contains no evidence as to the comparative merits of the theatres involved. In these 13 cities, indicated by Record citations, the undisputed evidence shows that the affiliated theatres are superior. In the absence of any evidence as to their respective sizes, locations, quality of equipment, and ability and reliability of management, it is impossible to draw any inference of discrimination from the licensing of certain features to X theatre and others to Y theatre.

City

1. Glendale, Cal.
2. San Jose, Cal. (R. 2132h).
3. Santa Ana, Cal.
4. Santa Monica, Cal. (R. 2132j-k).
5. Meriden, Conn.
6. New Britain, Conn.
7. Berwyn, Ill.
8. Evanston, Ill. (Ex. P-25, pp. 65-7).
9. Springfield, Ill. (Ex. P-25, pp. 87-9).
10. Hammond, Ind.
11. Council Bluffs, Iowa
12. Arlington, Mass. (Ex. P-25, pp. 133-4).
13. Brockton, Mass.[4] (Ex. P-25, pp. 135-40).
14. Taunton, Mass.[5] (Ex. P-25, pp. 161-7).
15. Atlantic City, N. J.
16. East Orange, N. J.

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[4] Exhibit P-25 shows that the unaffiliated Colonial theatre regularly uses one-half of RKO's product on first run.

[5] Exhibit P-25 shows that the unaffiliated Strand theatre now plays all RKO features on first run.

City

17. Irvington, N. J.
18. Orange, N. J.
19. Passaic, N. J.
20. Asheville, N. C.
21. Lorraine, Ohio
22. Massillon, Ohio
23. Steubenville, Ohio
24. Chester, Pa.
25. Westport, Ky. (Ex. P-25, pp. 257-61).
26. Pawtucket, R. I. (Ex. P-25, pp. 267-71).
27. Woonsocket, R. I.[6] (Ex. P-25, pp. 272-78).
28. Amarillo, Tex. (Ex. P-25, pp. 290-2).
29. El Paso, Tex. (Ex. P-25, pp. 296-8).
30. Waco, Tex. (Ex. P-25, pp. 305-7).
31. Charleston, W. Va.
32. Clarksburg, W. Va.
33. Appleton, Wis.
34. West Allis, Wis.
35. Oak Park, Ill.

D. RKO product was exhibited first run in affiliated theatres substantially larger than largest unaffiliated theatre in 50 cities

In each of these cities the smallest affiliated theatre showing an RKO feature from the first Block exceeded the seating capacity of the largest unaffiliated theatre by at least 300 seats. In addition, the superiority of several of the affiliated theatres in such other respects as furnishings, location, projection equipment, etc. is demonstrated by testimony or exhibits in the Record.

[6] Exhibit P-25 shows that the unaffiliated Park and Bijou theatres regularly license one-half of RKO's product for first run exhibition.

City	Seating Capacity of Smallest Affiliated Theatre[7]	Seating Capacity of Largest Unaffiliated Theatre[7]

With respect to the first 21 cities, Paramount's Ex. P-25 demonstrates the superiority of its theatres over the best unaffiliated theatre in each city. Because of the length of the statements in that exhibit, the comparisons are not repeated here.

1.	Fort Smith, Ark.	Temple (P) 870	Fort 500
2.	St. Petersburg, Fla.	La Plaza (P) 1685	Reno 800
3.	Bloomington, Ill.	Castle (P) 893	Ewing 400
4.	Danville, Ill.	Palace (P) 986	Time 560
5.	E. St. Louis, Ill.	Majestic (P) 1788	Avenue 1100
6.	Marion, Ind.	Paramount (P) 1196	Lunalite 376
7.	Burlington, Iowa	Capitol (P) 682	Avon 350
8.	Monroe, La.	Capitol (P) 1014	Ritz 600 (negro)
9.	Lewiston, Me.	Auburn (P) 1169	Ritz 500
10.	Chelsea, Mass.	Olympia (P) 1420	Strand 900
11.	Chicopee, Mass.	Rivoli (P) 1261	Victoria 750
12.	Greensboro, N. C.	National (P) 1486	Criterion 550
13.	High Point, N. C.	Broadhurst (P) 758	Ritz 400
14.	Winston-Salem, N. C.	State (P) 1536	Ardmore 496[8]
15.	Fargo, N. D.	Grand (P) 739	Princess 352
16.	Hamilton, Ohio	Palace (P) 846	Linden 449
17.	Middletown, Ohio	Strand (P) 1762	State 400
18.	Hazelton, Pa.	Grand (P) 896	Alton and Family 500 each
19.	Columbia, S. C.	Ritz (P) 730	State 374
20.	Johnson City, Tenn.	Majestic (P) 989	Sevier 650
21.	Galveston, Texas	Queen (P) 756	Isle 300 (except Carver 650, negro)

Except as otherwise noted, RKO's Ex. 28 comparing seating capacities appears to be the only evidence in the record respecting the suitability of theatres as first run outlets in the following cities.

22.	Anniston, Ala.	Ritz (P) 1216	Rialto 350
23.	Tucson, Ariz.	Rialto (F) 1084	Plaza 700

[See Ex. P-25, pp. 15-16.]

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[7] RKO Ex. 28.

[8] From P-25, p. 233; cf. RKO Ex. 28.

	City	Seating Capacity of Smallest Affiliated Theatre	Seating Capacity of Largest Unaffiliated Theatre
24.	Huntington Park, Calif.[9]	California (F) 1500	
25.	Stockton, Calif.	California (F) 2172	Roxy 750
	[The California Theatre is "much the finest" in the City (R. 2132f-g).]		
26.	New London, Conn.	Garde (W) 1602	Empire 1117
27.	Torrington, Conn.	Warner (W) 1854	State 999
28.	Waterbury, Conn.	State (W) 1951	Cameo 1041
29.	Belleville, Ill.	Lincoln (F) 1514	Ritz 500
30.	Hutchinson, Kan.	Midland (F) 965	State 400
31.	Hagerstown, Md.	Academy (W) 1142	Henry's 400
32.	Everett, Mass.	Capitol (W) 1955	Park 820
33.	Lynn, Mass.	Warner (W) 1789	Capitol 1300
	[See Ex. P-25, pp. 154-7.]		
34.	Joplin, Mo.	Fox (F) 1779	Hippodrome 1317
35.	Springfield, Mo.	Gilloiz (F) 1438	Granada 650
	[The Fox theatres are superior in every respect and the most suitable for first run exhibitions (R. 2070-71).]		
36.	Bayonne, N. J.	DeWitt (W) 2736	Victory 1100
37.	Bloomfield, N. J.	Broadmoor (W) 960	Savoy 400
38.	Hoboken, N. J.	Fabian (W) 3000	Rivoli 500
39.	Springfield, Ohio	Majestic (W) 735	Hippodrome 400
40.	Lower Merion Twp., Pa.	Ardmore (W) 1282	Suburban 800 Liberty 1400
41.	McKeesport, Pa.	Memorial (W) 2060	Nuluna 450
42.	Sharon, Pa.	Liberty (W) 1207	Mayfair 1100
43.	Upper Darby, Pa.	69th St. (W) (P) 1615	Basle 700
44.	Washington, Pa.	State (W) 1318	Criterion 350
45.	Spartanburg, S. C.	Palmetto (P) 813	Industrial School 200
46.	Ogden, Utah	Ogden (F) 813	
47.	Bellingham, Wash.	Mt. Baker (F) 1637	Grand 832
48.	Kenosha, Wis.	Gateway (W) 1442	Roosevelt 780
	[See R. 1995-6, Tr. 2709-10]		
49.	Oshkosh, Wisc.	Strand (W) 1165	Grand 857
50.	Sheboygan, Wisc.	Rex (W) 918	Butterfly 437

[9] RKO Exhibit 28 listed the Warner Theatre as the largest unaffiliated theatre. It subsequently appeared that this was an inadvertent error (RKO Ex. 11). However, *a priori*, any unaffiliated theatre would be smaller, but the Record does not show precisely how much smaller. With this *caveat*, the city is listed in this group.

E. RKO product was exhibited first run in affiliated theatres larger than largest unaffiliated theatres in 8 cities

These cities are analogous to those in section D, but are listed separately because the difference in seating capacity is, in absolute terms, smaller. They are generally smaller cities. In each, the smallest unaffiliated theatre which played an RKO feature from the first block had less than 1000 seats, but was 200 to 300 seats larger than the largest unaffiliated theatre. In comparing theatres under 1000 seats, a difference of 200 is substantial. These cities are:

City	Seating Capacity of Smallest Affiliated Exhibitor	Seating Capacity of Largest Unaffiliated Theatre
1. Bristol, Conn.	Bristol (W) 815	Carberry 600
2. Orlando, Fla.	Grand (P) 720	Rex 500
3. Macon, Ga.[10]	Rialto (P) 766	Bibb 500
4. Alton, Ill.	Princess (P) 700	State 500
5. Galesburg, Ill.[10]	West (P) 644	Grove 394
6. Salem, Ore.	Brand (W) 727	Hollywood 496
7. Wilkes-Barre, Pa.	Orpheum (P) 796	Crystal 500
8. Greenville, S. C.[10]	Rivoli (P) 744	Paris & Branwood 500 each

F. RKO product was exhibited first run in affiliated theatres in cities where highest grossing RKO features were shown in theatres larger than any unaffiliated theatre in 43 cities

In these cities RKO licensed its first block to affiliated theatres, and the two highest grossing features, *Lady Takes a Chance* and *Fallen Sparrow*, played first run, ex-

[10] See Exhibit P-25 for a detailed comparison of the first-run theatres affiliated with Paramount and the best unaffiliated theatres in respect to other important requirements of a first-run outlet.

clusive of moveovers, in affiliated theatres which were larger than the largest unaffiliated theatres in such cities. Plaintiff defines a first-class feature as one which grosses $450,000 in domestic film rentals (Complaint, Paragraph 15e), and the other three features in RKO's first block fell far short of this amount.[11] RKO is entitled to license a block of five features to an exhibitor who can show its high grossing pictures in larger theatres and exhibit the smaller grossing pictures in smaller theatres. The following schedule includes Record citations demonstrating the superiority of affiliated theatres in certain specific situations:

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[11] Exhibit 93 shows that as of April 26, 1945 the domestic gross rentals earned by the first block features were:

Lady Takes a Chance	$1,955,781
The Fallen Sparrow	1,170,032
Adventures of a Rookie	339,908
So This Is Washington	308,327
Seventh Victim	201,776

City	Affiliated Exhibitor of "Lady" and of "Sparrow"	Largest Unaffiliated Theatre	Record Citations Demonstrating Superiority of Affiliated Outlets
1. Mobile, Ala.	Saenger (P) 2,655	Azalea 750 Pike 750 Lincoln 750 (Col.)	Ex. P-25, p. 11
2. Montgomery, Ala.	Paramount (P) 1,525	Charles 800	Ex. P-25, pp. 4-5
3. Phoenix, Ariz.	Fox (F) 1,796 Rialto (P) 811	Phoenix 700	Ex. P-25, pp. 13-14
4. Belvedere, Twp., California	Golden Gate (F) 1,456	Strand 900	
5. Berkeley, Calif.	United Artists (F) 1,646	Rivoli 1,410	R. 2132e
6. Beverly Hills, Calif.	Beverly (F) 1,318	Elite 824	
7. Fresno, Calif.	Wilson (F) 1,899 Tower (F) 930 (d/d)	White 1,400[12]	
8. Inglewood, Calif.	Academy (F) 1,190	Seville 766	
9. Riverside, Calif.	Riverside (F) 1,528 DeAnza (F) 978	Del Rio 48[illegible]	
10. San Bernadino, Calif.	Fox (F) 1,854	Rialto 700	

[12] RKO Exhibits 28 and 11 classify the Warner (2400 seats) as unaffiliated. This appears to be erroneous (R. 2132g).

	City	Affiliated Exhibitor of "Lady" and of "Sparrow"	Largest Unaffiliated Theatre	Record Citations Demonstrating Superiority of Affiliated Outlets
11.	Miami Beach, Fla.	Beach (P) 1,615 Sheridan (P) d/d 1,343	Biscayne Plaza 1,400	
12.	Augusta, Ga.	Miller (P) 1,656	Lenox 800	Ex. P-25, p. 33
13.	Columbus, Ga.	Bradley (P) 1,640	Pastime 800	Ex. P-25, p. 33 pp. 35-36
14.	Savannah, Ga.	Lucas (P) 1,480	Savannah 900	Ex. P-25, pp. 41-46
15.	Anora, Ill.	Paramount (P) 2,016 Tivoli (P) 1,015	Isle 750	Ex. P-25, pp. 51-52
16.	Joliet, Ill.	Rialto (P) 2,087 Princess (P) 813	Mode 750	Ex. P-25, pp. 72-73
17.	Waukegan, Ill.	Genessee (P) 1,865 Academy (P) 943	Time 800	Ex. P-25, pp. 91-92
18.	Topeka, Kansas	Jayhawk (P) 1,344	Coed 600	R. 2069-70
19.	Alexandria, La.	Paramount (P) 1,014	Don 800	Ex. P-25, p. 117
20.	Holyoke, Mass.	Victory (P) 1,680 Strand (P) 1,129	Majestic 1,000	Ex. P-25, pp. 152-153
21.	Lawrence, Mass.	Palace (W) 1,781 Broadway (W) 1,204	Majestic 1,000	
22.	Pittsfield, Mass.	Capitol (P) 1,332 Palace (P) 1,658	Kameo 900	Ex. P-25, pp. 159-60

City	Affiliated Exhibitor of "Lady" and of "Sparrow"	Largest Unaffiliated Theatre	Record Citations Demonstrating Superiority of Affiliated Outlets
23. Meridan, Miss.	Temple (P) 1,633	Royal 450	Ex. P-25, p. 203
24. Albuquerque, N. M.	Kimo (P) 1,278	El Rey 750	Ex. P-25, pp. 208-209
25. Elmira, N. Y.	Keeney's (W) 2,366	Capitol 1,500	
26. Newburgh, N. Y.	Ritz (P) 1,303 Broadway (P) 1,240	Academy 1,217	Ex. P-25, pp. 211-12
27. Raleigh, N. C.	Ambassador (P) 1,471	Wake 800	Ex. P-25, pp. 226-27
28. Rocky Mount, N. C.	Center (P) 1,014	Cameo 580	Ex. P-25, p. 229
29. Mansfield, Ohio	Ohio (W) 1,630 Madison (W) 1,512	Park 1,300	
30. Marion, Ohio	Palace (P) 1,540	Ohio 800	Ex. P-25, pp. 241-3
31. Portsmouth, Ohio	Columbia (W) 1,022 LaRoy (W) 1,374	Garden 700	
32. Johnstown, Pa.	State (W) 1,646 Cambria (W) 1,144	Embassy 1,000[12]	

[12] RKO Exhibit 28 shows "University of Wisconsin 1300". This is not a commercial theatre (R. 1994-5). The superiority of the two affiliated theatres is shown at R. 1994, but the size of the Eastwood, presently a third and fourth run theatre, is not stated.

City	Affiliated Exhibitor of "Lady" and of "Sparrow"	Largest Unaffiliated Theatre.	Record Citations Demonstrating Superiority of Affiliated Outlets
33. Abilene, Tex.	Paramount (P) 1,409 Majestic (P) 928	B. Walker 675	Ex. P-25, pp. 288-9
34. Austin, Tex.	Paramount (P) 1,419 State (P) 997	Ritz 800	Ex. P-25, pp. 294-5
35. Port Arthur, Tex.	Strand (P) 1,046	Groves 504	
36. Tyler, Tex.	Tyler (P) 1,085 Liberty (P) 749	Joy 584	Ex. P-25, pp. 303-4
37. Wichita Falls, Tex.	Wichita (P) 1,204 Majestic (P) 1,184	Tower 874	Ex. P-25, pp. 309-10
38. Newport News, Va.	Paramount (P) 1,241	Warwick 800	Ex. P-25, p. 315
39. Parkersburg, Va.	Smoot (W) 913	Virginia 900	
40. Madison, Wis.	Orpheum (F) 2,246 Capitol (W) 2,242	Eastwood	R. 1994-5
41. Racine, Wis.	Venetian (W) 1,963 Rialto (W) 1,279	Mainstreet 1,100	R. 1993-4
42. Wausau, Wis.	Wausau (F) 797 Grand (F) 1,424	Hollywood 700	
43. Pensacola, Fla.	Saenger (P) 1,883	Ritz 600	Ex. P-25, pp. 27-8

G. RKO product was exhibited first run in affiliated theatres smaller than largest unaffiliated theatre in 12 cities

In 12 cities of the 320, RKO licensed four or five of its first block for first run exhibition in affiliated theatres which were smaller than the largest unaffiliated theatres in such cities. However, both exhibits and testimony justify licensing to affiliated theatres in most of these cities:

	City	Affiliated Theatres[14]	Larger Unaffiliated Theatres[15]
1.	Little Rock, Ark.	Arkansas (P) 1284 Pulaski (P) 1053 Capitol (P) 1233 Royal (P) 1164	Robinson Auditorium 3000
2.	Pasadena, Calif.	Academy (F) 1673 Tower (M) (F) 747 Pasadena (M) (F) 894	Raymond 1900 Colorado 1709
	[These Fox theatres are "well maintained modern houses" (R. 2132h-i, Tr. 2894-95).]		
3.	Decatur, Ill.	Empress (P) 991 Lincoln Sq. (P) 1389	Avon 1014
	[Exhibit P-25, pp. 61-2, shows that the unaffiliated Avon is poorly maintained, has uncomfortable seats and is poorly ventilated. Another unaffiliated theatre, the Varsity Theatre with 996 seats, is modern but is a neighborhood theatre and does not have good transportation facilities.]		
4.	Butte, Mont.	Rialto (F) 1238 American (F) 851	Montana 1426 Park 880
5.	Great Falls, Mont.	Liberty (F) 1694 Towne (F) 725	Civic Center 1882

[14] (M) signifies moveover theatre.

[15] RKO Ex. 28.

City	Affiliated Theatres	Larger Unaffiliated Theatres
6. Poughkeepsie, N. Y.	Stratford (P) 1359 Bardavon (P) 1190	Rialto 1600

[Ex. P-25, pp. 217-18, shows that the Liberty, with 715 seats, is the best unaffiliated theatre in this city, but that it cannot compare with the Bardavon or Stratford in location or physical condition.]

7. Durham, N. C.	Center (P) 1254 Rialto (P) 638 Carolina (P) 1700	Quadrangle Pictures 1500 Criterion 800

[Ex. P-25, pp. 219-20 shows that the Uptown with 500 seats is the best unaffiliated theatre in this city, that the Center Theatre is an excellent, modern, fireproof house and is outstanding in this area and that the Carolina is well constructed and well maintained.]

8. Lancaster, Pa.	Capitol (W) 1161 Hamilton (W) 1014 Grand (W) 853	Colonial 1500 Fulton 1350
9. York, Pa.	Capitol (W) 848 Rialto (W) 798	York 935
10. Haverhill, Mass.	Colonial (P) 1255 Paramount (P) 1738	Strand 1400

[Ex. P-25, pp. 147-50, shows that the Strand has 1250 seats, that although it is in good condition, its stage, ventilating, and rest room equipment are inferior to those of the Colonial and Paramount.]

11. Lima, Ohio	Sigma (W) 891 Ohio (W) 1804	Quilna 1000
12. Lynchburg, Va.	Isis (P) 731 Paramount (P) 1530 Trenton (P) 950	Academy 800

[Ex. P-25, pp. 313-14, shows that the Academy with 1,000 seats is inferior in every respect to the Paramount.]

APPENDIX F

Comparison Rentals Paid by Affiliated and Unaffiliated First-Run Theatres in Cities Over 25,000 Population for RKO's First Block of Features, 1943-44

(Excluding theatres in lump-sum or national gross deals, theatres in which RKO had interest of 50% or more, and theatres controlled by RKO in which RKO and another defendant had aggregate interest of 50% or more)

Source: RKO Exhibits 14, 17

	Number of Theatres Playing First-Run	Average Seating Capacity	Average Rental	Average Rental Per Seat of Capacity
Lady Takes A Chance				
Affiliated Theatres	278	1635	$1,671.57	$1.02
Unaffiliated Theatres	153	1231	1,255.46	1.02
The Fallen Sparrow				
Affiliated Theatres	260	1493	929.08	.62
Unaffiliated Theatres	147	1233	767.57	.62
So This Is Washington				
Affiliated Theatres	211	1311	177.97	.14
Unaffiliated Theatres	144	1077	151.54	.14
Adventures of a Rookie				
Affiliated Theatres	250	1372	171.78	.12
Unaffiliated Theatres	147	1156	124.29	.11
Seventh Victim				
Affiliated Theatres	226	1325	120.20	.09
Unaffiliated Theatres	149	1053	129.92	.12

Unaffiliated Theatres: Theatres in which no defendant had any interest.

Affiliated Theatres: All other theatres.

DISTRIBUTION OF FIRST RUN EXHIBITIONS OF RKO's 1943-1944 FIRST BLOCK FEATURES BETWEEN AFFILIATED AND UNAFFILIATED THEATRES IN CITIES OVER 25,000 POPULATION, EXCLUDING EXHIBITIONS IN RKO THEATRES.*

(Source: RKO Exhibits 13 and 14)

	The Fallen Sparrow	Adventures of a Rookie	The Seventh Victim	So This is Washington	Lady Takes a Chance	Total First Block
TOTAL Number	407	397	375	355	431	1965
Number in Affiliated Theatres**	220	212	190	173	236	1031
Percent of TOTAL	(54.05)	(53.40)	(50.67)	(48.73)	(54.76)	(52.47)
Number in Minority Affiliated Theatres***	40	38	36	38	42	194
Percent of TOTAL	(9.83)	(9.57)	(9.6)	(10.71)	(9.74)	(9.87)
Number in Unaffiiliated Theatres****	147	147	149	144	153	740
Percent of TOTAL	(36.12)	(37.03)	(39.73)	(40.56)	(35.50)	(37.66)

* This Table does not include 207 exhibitions in theatres in which RKO has an interest of 50% or more, and in theatres controlled by RKO in which RKO and another defendant have an aggregate interest of 50% or more.

** "Affiliated theatres" are those in which one or more of the defendants (other than RKO) have an interest of 50% or more.

*** "Minority Affiliated Theatres" are those in which a defendant (other than RKO) has an interest of less than 50%.

**** "Unaffiliated theatres" are all other theatres.